**Statement of**

**Thomas E. Crocker**

**Before the Subcommittee on Domestic Monetary**

**Policy, Technology and Economic Growth**

**Committee on Financial Services**

**U.S. House of Representatives**

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Mr. Chairman and Members of the Committee, my name is Thomas E. Crocker. I am a partner with the Washington office of the law firm of Alston & Bird LLP.

My involvement with the E-Sign Act goes back to 1997 when, representing the then-Citicorp, I helped draft a predecessor version of the E-Sign Act in the 105th Congress. More recently, we represented Charles Schwab & Co., Inc. and the Securities Industry Association in all phases of the development, consideration and eventual enactment of the E-Sign Act in the 106th Congress. Growing out of this experience, I have written a lengthy article on the E-Sign Act entitled "The E-Sign Act: In Facilitation of E-Commerce," published in the March 2001 issue of *Mealey's Cyber Tech Litigation Report*. I ask that a copy of this article be included in the Record as an appendix to my prepared statement.

Today, however, I am testifying today solely on my own behalf, as an attorney in private practice who has assisted a number of clients in implementing the E-Sign Act and as one who, therefore, has had some practical experience with the types of real world concerns that businesses have been having in complying with the Act.

**The Importance of Uniformity, Consistency and Legal Certainty**

Almost exactly one year ago -- on June 30, 2000 -- the President signed the E-Sign Act into law. At the time, it was hailed as "the single most important piece of e-commerce legislation enacted in the 106th Congress." Now, one year later, it is appropriate to ask whether the E-Sign Act has lived up to its promise and, if not, why not.

The significance -- and the promise -- of the E-Sign Act lay in its central attribute of being a technology-neutral, uniform federal law designed to encourage the use of electronic records and signatures. *Uniformity* and *consistency* were -- and remain -- the most important ingredients to providing industry with the *legal certainty* that it needs to conduct e-business on a national and global scale. These touchstones -- uniformity, consistency, legal certainty -- are important measures by which the success or failure of the E-Sign Act will appropriately be judged.

As part of our representation of clients seeking to implement the E-Sign Act, we recently conducted an informal website survey to try to determine how widespread reliance on the E-Sign Act has actually been. This survey was aimed primarily at the financial services industry -- banks, broker dealers, insurance companies -- but also touched on other business sectors, such as health care, technology and on-line sales. Our findings confirmed what we had long suspected to be the case -- that use of the E-Sign Act has been slow to take off and that compliance with it is limited at best. Indeed, except for certain financial services companies many of which were instrumental in seeking enactment of the E-Sign Act, its embrace by U.S. industry at large has been spotty.

Why is this so?

Based on our work with various clients seeking to understand and implement the E-Sign Act, we believe that, although well intended, the E-Sign Act in its present form fails to deliver on its promises of uniformity, consistency and legal certainty.

This failure is compounded by the unusual absence of a Statement of Managers as part of the legislative history of the Act which would help in its interpretation, as well as by the fact that the Act is studded with well over two dozen vague terms in its critical provisions (such as "reasonably demonstrates," "material risk," "accurately reproduced," and so forth) which inject uncertainty into its meaning.

Against this background, our clients' practical concerns focus on three specific areas in the Act -- consumer consents, preemption and agency rulemaking.

**Consumer Consents**

Throughout the Congressional debate on the E-Sign Act there was wide support by industry for reasonable consumer protection provisions. As originally drafted, the bill envisaged an even playing field between electronic and traditional media, with existing consumer protections very much in place and unaffected by the legislation. However, as is well known, the Act as signed into law contains consumer consent provisions that go beyond those that exist in the paper world.

Compliance with these requirements has been feasible. Nonetheless, two elements of the consumer consent requirements continue to cause concerns which contribute to a reluctance to use the Act.

First, the "reasonably demonstrates" requirement at section 101(c)(1) is vague. It has, however, proven workable, provided it is interpreted to allow firms flexibility in meeting its requirements and it is used in its simplest form -- one company, one consumer, one electronic system. However, the concern is that the "reasonably demonstrates" requirement is in a sense a straightjacket because it requires a company to communicate with its customer only through the identified single system that the customer has originally chosen to access the information in electronic form. This rigid, narrow procedure does not take account of the reality that some consumers own multiple computers or of the increased market presence of handheld terminals. It creates issues when a customer deals with a firm through a variety of access channels.

The second major concern with the consumer consent provisions is the requirement, also at section 101(c)(1), governing what happens if the hardware or software requirements needed to access or retain electronic records change after the consumer has given affirmative consent. If that change "creates a *material risk* that the consumer will not be able to access or retain a subsequent electronic record [italics added]" then the party providing the electronic record must go through the entire consumer notice, consent and reasonable demonstration process all over again. The very vagueness of the term "material risk" creates uncertainty as to when it must be invoked. For example, does a simple system upgrade require a company to go through the costly process of notifying all of its customers and obtaining consents *de novo*? The uncertainty of this contingency in particular has proved discouraging to companies that wish to take advantage of the E-Sign Act.

**Preemption Provisions**

Another reason that business have shied away from relying on the E-Sign Act is the mind-numbing complexity of its preemption provisions and the uncertainties that they raise in connection with the Act's interface with the Uniform Electronic Transactions Act ("UETA"). Put yourself in the shoes of a company that wants to rely on the E-Sign Act. You must first ask yourself whether the state whose law you want to govern has enacted a clean version of UETA, as reported by the National Conference of Commissioners on Uniform State Laws. If it has, then that state's enactment of UETA should govern, at least in theory. But not many states have done that. You must therefore ask whether the changes by the state to UETA are pursuant to section 3(b)(4) of UETA. If they are, then the E-Sign Act preempts that state's UETA only *to the extent* those changes are inconsistent with Titles I or II of the E-Sign Act. However, if the changes by the state are not pursuant to section 3(b)(4) -- and many are not -- then you go to the second prong of the two-prong preemption test under section 102 of the E-Sign Act, which seemingly would preempt the state's version of UETA unless further tests are satisfied. In fact, there is considerable debate among commentators about whether preemption under the second prong of the test would merely be section-by-section or of the entire UETA as enacted by the state.

Ultimately, in any given case, whether the E-Sign Act preempts state law may have to be determined through litigation, with the very real possibility that courts in different states would produce different results as to any given state's law. This uncertainty about the preemption provisions has made industry hesitant to rely on the E-

Sign Act. As one in-house counsel at a large insurance company recently told me: "I was very excited about the E-Sign Act when it passed. But once I worked through what was is in it … well, just *forget* it."

**Agency Rulemaking**

The third major concern is the agency rulemaking procedures at section 104 of the Act. This section is designed to govern the interface of the Act with federal and state agency rulemaking. However, it also is confusingly and complexly drafted so that the goals of uniformity, consistency and legal certainty come up short. Federal agencies have been struggling with the effect of this section on their rules for months, leaving regulated industries in limbo. To the extent interpretations have been issued, they have varied widely in approach. On the one hand, the Federal Reserve Board has issued interim rules which require compliance with the E-Sign Act -- and certain additional requirements that some in industry fear may impermissibly go beyond the Act -- for the electronic delivery of federally mandated disclosures under five consumer protection regulations (Regulations B, E, M, Z and DD). On the other hand, shortly after enactment of the E-Sign Act, the prior Administration's Office of Management and Budget, citing only the views of the minority in the House and Senate, issued an interpretive guidance memorandum to the federal agencies which construed the Act's applicability so narrowly as to raise eyebrows among those who had actually been involved in development of the Act. Consistent with this approach, for example, just recently the Department of Justice and OMB reportedly have taken the position, at least informally, that the E-Sign Act does

not apply to doctors' signatures on medical prescriptions because they do not affect interstate commerce and are a "governmental" function and thus outside the scope of the application of the E-Sign Act. Similarly, recent interpretations of the Act by the Securities and Exchange Commission ("SEC") are, in the view of some companies, so narrow and lacking in the required findings that they threaten to read portions of the E-Sign Act out of existence for the broker-dealer community.

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In conclusion, there are those who say it is premature to consider amending the E-Sign Act, that the best approach is "wait and see." However, based on my experience, the complexities and ambiguities of the statute have already resulted in a tangible level of discomfort in industry that procedures, once adopted, might be held inadequate or out of compliance when the law is eventually interpreted by the courts or federal or state agencies. Ironically, the e-commerce industry's position has long been that the government should refrain from creating regulations and guidelines and should allow the market to determine the best procedures. In the case of the E-Sign Act, it appears that the law of the marketplace has indeed ruled and that much of industry has voted with its feet. It therefore is not clear what further "wait and see" will achieve. If the Congress wishes to adjust the E-Sign Act to accord it more closely with the three original goals of uniformity, consistency and legal certainty, the time to commence that process may well be now.

# The E-Sign Act: In Facilitation of E-Commerce

**By Thomas E. Crocker, Partner**

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On June 30, 2000, at a ceremony in Philadelphia's Congress Hall, near the site of the signing of the Constitution, President Bill Clinton signed the Electronic Signatures in Global and National Commerce Act (the "E-Sign Act" or the "Act")[2] into law. Hailing the Act as a "big deal,"[3] the President used a smart card to sign the Act electronically -- but not before he had first signed the legislation using a wet signature to ensure that his signature was in fact valid.

The E-Sign Act is landmark legislation because it gives recognition and effect to electronic signatures, contracts and records. It not only authorizes so-called "digital signatures" but also empowers the use of online contracting and provision of notices. The Act's coverage of "electronic records," which include a wide variety of notices and other documents, is particularly significant. No longer should these electronic methods be open to question. Billions of dollars of business-to-business and business-to-consumer

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[1] Copyright Thomas E. Crocker, Partner, Alston & Bird LLP.

[2] Pub. L. 106-229.

[3] *See* Lawrence L. Knutson, "Clinton Signs E-Signature Bill," *AP U.S. News*, June 30, 2000. The E-Sign Act was long sought by both the financial services and the technology industries. If it lives up to its sponsors' expectations, it could soon allow businesses to seal multimillion-dollar mergers and consumers to apply for loans, close mortgages or trade stocks with a simple click of a computer key. The E-Sign Act could potentially have a profound effect on both business-to-business and business-to-consumer E-commerce. According to two recent estimates, U.S. online users will account for 75 percent of all U.S. retail spending (both online and offline) in 2005, up to 43 percent in 1999, with U.S. Internet B-to-B trade soaring to $6 trillion in 2005. *See* Jupiter Communications, Inc. Forecasts, "Online Retailers Missing Greatest Opportunity: Web-Influenced Spending To Exceed $630 Billion in 2005" (May 18, 2000) and "U.S. Internet B-to-B Trade Soars to $6 Trillion in 2005" at http://www.jupiterresearch.com/company/pressrelease.jsp?doc.

transactions could potentially be facilitated as written signatures and paper notices will at least in principle no longer be required.

This article is divided into two parts. Part I is a brief legislative history of the E-Sign Act.[4] Part II is a section-by-section analysis of the content of the Act which focuses on the legal and practical questions that companies are likely to face as they implement the Act.

## Part I. History of the E-Sign Act

### 1. The 1997 Technical Amendments to the Bank Protection Act of 1968

The genesis of the E-Sign Act was a growing perception in Congress and the financial services community in late 1996 and early 1997 that the piecemeal enactment by states of individual state electronic authentication laws would produce a regulatory and compliance nightmare that would inhibit the growth of electronic commerce on a national scale.[5] In April 1997 a group of financial services companies met to devise a

[4] The author wishes to acknowledge, with gratitude, the assistance of Patricia Wick in the preparation of this article. The ideas expressed herein are solely those of the author and not necessarily those of Alston & Bird LLP or any of its clients.

[5] As of July 31, 2000, some 48 states had enacted or were in the process of enacting legislation to regulate electronic authentication. No two of these state laws were the same. In layman's terms, the laws came in one of two forms: "thick" or "thin." The model for the "thick" approach is the Utah Digital Signature Act of 1996, Utah Code Section 46-3-101 et seq., which addresses use of electronic authentication by the general public, is Public Key Infrastructure ("PKI")-specific and regulates certificate authorities ("CAs") through various systems of registration, licensing and payment of fees. (PKI establishes electronic authentication through issuance of a certificate, which is a computer-based record that identifies the CA issuing it, identifies its subscriber, contains the subscriber's public key and is digitally signed by the CA). On the other hand, a law adopting the "thin" approach might merely give some legal recognition and effect to electronic authentication or regulate only transactions with the state government.

federal legislative solution. This group eventually evolved into the "Ad Hoc Committee for Electronic Authentication" (the "Ad Hoc Committee"). The goal of the group was to seek legislation to empower financial institutions and their affiliates to engage in the electronic transmission and execution of documents, acceptance of such documents and signatures from others, and reliance on third-party assurances as to the integrity of electronic documents and signatures, with the federal bank supervisory agencies to be charged with overseeing these activities by financial institutions.

The decision to limit the proposed legislation to financial institutions was dictated primarily by the committee jurisdictional system in Congress. The consensus of the Ad Hoc Committee was that if jurisdiction over the legislation were limited to the House and Senate Banking Committees, the bill would move more quickly and stand a better chance of reaching the floor for a vote. Moreover, the bill focused on financial institutions because the Ad Hoc Committee perceived them to be uniquely situated. Thus, financial institutions are accustomed to assuming "trusted third-party" roles. They serve as trustees and offer notary and signature guarantee services. The Ad Hoc Committee

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Beyond these two basic formats, state laws vary widely regarding such matters as registration of CAs and the minimal content and technological attributes of certificates. Other areas of divergence include the treatment of licensed and unlicensed CAs; whether to impose fees on CAs (and how much); the suspension of certificates; the extent of a CA's liability for erroneous certification; whether a person who receives a message sent with a certificate must actively agree to use the electronic form; and the definitions of such basic terms as "certificate," "digital signature," "message" and "accept a certificate."

In addition to variations in state statutory treatment of electronic authentication, state courts have also been a source of uncertainty. Some courts have upheld electronic contracts, provided they evidence true mutual assent. *See*, e.g., CompuServe Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996); Groff v. America Online, Inc., 1998 WL 307001 (R.I. Super. 1998). However, other courts have taken a different view. For example, in Roos v. Aloi, 127 Misc. 2d 864, 487 N.Y.S. 2d 637 (1985), a New York court held a tape-recorded contract unenforceable for failure to comply with the Statute of Frauds. Also see Department of Transportation v. Norris, 222 Ga. App. 361, 474 S.E. 2d 216 (1996) (rv'd. on other grounds), popularly known as the "beeps and chirps" case, in which the Court of Appeals of Georgia held that a facsimile

viewed offering electronic authentication services to be a logical outgrowth and functional equivalent of such technical activities by banks. Also, financial institutions are highly regulated entities, and this unique layer of regulation sets financial institutions apart from other providers of electronic authentication. The Ad Hoc Committee concluded that limiting the legislation to financial institutions was particularly appropriate as a first step or "confidence-building" measure designed to facilitate the broader and ultimate national growth of electronic commerce.[6]

Creating a core drafting group, the Ad Hoc Committee prepared a proposed bill in the form of an amendment to the Bank Protection Act of 1968.[7] The proposed legislation was a minimalist approach, financial services-specific in nature. It authorized financial institutions to use electronic authentication to (i) authenticate the sender of the document, (ii) determine that the document was not altered, changed or modified during its transmission and (iii) verify that the document received was in fact sent by the identified party. It allowed financial institutions to enter into agreements using electronic authentication and to allocate among the various parties' rights, obligations and liabilities. It authorized other parties dealing with financial institutions to use electronic authentication and vice versa. However, coverage was optional, in that financial institutions, broadly defined to include insured banks, bank holding companies and their subsidiaries and affiliates, were to elect coverage under the legislation. By so electing

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transmission of a plaintiff's notice of a legal claim did not satisfy the requirement of written notice because a fax is only a series of "beeps" and "chirps."

[6] For additional information on the Ad Hoc Committee's position see white paper entitled, *Framework for National Electronic Commerce Legislation*, Ad Hoc Committee, April, 1997.

[7] 12 U.S.C. § 1881. The Bank Protection Act of 1968 requires federal banking agencies to implement standards designed to ensure that financial institutions take appropriate steps to guard against theft.

and notifying the Federal Reserve Board, they would be entitled to benefits of the bill insofar as it protected them from conflicting state regulation. However, by so electing, a financial institution would become subject to such regulations as the Federal Reserve Board might promulgate on electronic authentication. To protect financial institutions from competing or conflicting requirements under state law, the bill precluded a state from requiring the registration or licensing of a financial institution to engage in or use electronic authentication services, from regulating the financial institutions with respect to such activity or imposing a fee as to such services or requiring or limiting the financial institution's fee structure with its contracting parties. The bill explicitly did not affect consumer protections afforded by the Truth-in-Lending Act and the Electronic Fund Transfer Act. However, the bill was not technology-neutral as originally drafted because it defined "electronic authentication" to mean a "cryptographic technique" (the bill was later amended to be technology neutral before it was introduced.)[8]

On July 9, 1997 the House Banking Committee's Domestic and International Monetary Policy Subcommittee, Chaired by Rep. Michael Castle (R-DE), held a hearing on the broad question of the need for federal legislation in the area of electronic authentication (the hearings did not focus on the Ad Hoc Committee's proposed draft because no bill had yet been introduced). The hearings were a follow-up to a series of hearings held in the 104th Congress by the Subcommittee on "The Future of Money." Representatives of Citibank, Visa International, Barclays, Digital Signature Trust Co., the

[8] Technology neutrality is important because public key cryptography is not the only technology capable of playing a role in electronic contracting. Biometrics, including signature dynamics, retinal scans, voice

Information Technology Division of the Commonwealth of Massachusetts and the Electronic Commerce Forum ("ECF") testified. All participants endorsed the need for federal legislation in one form or another. The testimony of P. Michael Nugent, General Counsel for Technology and Intellectual Property at Citibank, touched on the central issues:

> The problem is that if there are 50 state regimes governing electronic authentication, the implementation of secure electronic banking and commerce over the Internet will become costly and inefficient. Fifty differing legal regimes will diminish the likelihood of seamless and uniform electronic banking laws and commerce which by their very nature are interstate in nature. Fifty different regimes will reduce the incentive for new market entrants to offer electronic commerce and banking products and services. Fifty different regimes will confuse consumers doing business over the Internet and will result in a patchwork quilt of different legal protections, commercial standards and levels of security.
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> There is also a competitiveness issue. Foreign countries are allowing electronic authentication without a variety of conflicting intra-country rules and regulations. They thus facilitate commerce and the competitiveness of their financial institutions and companies. For the U.S. financial services to compete in the world market it needs uniformity and simplicity at home.[9]

On October 28, 1997 the Subcommittee on Financial Services and Technology of the Senate Committee on Banking, Housing and Urban Affairs (the "Senate Banking Committee"), chaired by Senator Robert R. Bennett (R-UT), held a hearing on the broad subject of "Legislation to Provide a Uniform Framework and Guidelines for Electronic Authentication Protecting Transactions Over the Internet." Witnesses at the October 28 hearing included representatives of Citicorp, the Bankers Roundtable, Digital Signature

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recognition and other electronic techniques, are under development. The biometrics industry wants to ensure that the marketplace, rather than Congress, decides which technology wins acceptance.

Trust Co., Bank of America (representing the Coalition of Service Industries ("CSI"), Ford Motor Credit Company (representing the ECF) and the Deputy General Counsel of the Information Technology Division of the Commonwealth of Massachusetts. In a nod to what the ECF viewed as the "bank-centric" nature of the Ad Hoc Committee's draft proposal, the ECF representative criticized the Ad Hoc Committee's draft by stating in his testimony that "Electronic authentication should not become the exclusive domain of one industry or industry segment."[10] Nonetheless, all witnesses testified in favor of the general need for federal legislation.

However, in separate testimony, also on October 28, before the House Science Committee's Technology Subcommittee, Department of Commerce General Counsel Andrew J. Pincus ("Pincus") urged Congress *not* to enact electronic authentication legislation, despite varying laws adopted by the states. "It is too early – and we do not know nearly enough – for the Federal Government to endorse a particular legislative approach," Pincus stated.[11]

On February 2, 1998 Chairman Bennett introduced a bill based in part on the Ad Hoc Committee's draft as the "Digital Signature and Electronic Authentication Law

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[9] Statement of P. Michael Nugent, General Counsel for Technology and Intellectual Property, Citibank, before the Committee on Banking and Financial Services, Subcommittee on Domestic and International Monetary Policy, United States House of Representatives, July 9, 1997.

[10] Testimony of Dick Mossberg, Associate Counsel, Government Affairs, Ford Motor Credit Company, on behalf of the Electronic Commerce Forum before the Committee on Banking, Housing and Urban Affairs, Subcommittee on Financial Services and Technology, United States Senate, October 28, 1997.

[11] Quoted in *Reuters News Media*, "Clinton Administration Wants No Digital Signature Bill Yet," October 29, 1997. *See* also "Testimony of Andrew J. Pincus, General Counsel of the Department of Commerce before the House Committee on Science, Subcommittee on Technology," United States House of Representatives, October 18, 1997.

(SEAL) of 1998" (S. 1594), which was referred to the Senate Banking Committee.[12] However, the Bennett bill died in that Committee at the end of the 105th Congress.

### 2. Legislative Efforts in the 106th Congress

So matters remained until the start of the 106th Congress in January, 1999, almost a year after the introduction of Chairman Bennett's bill. During the interim, Internet usage and electronic commerce continued to grow at startling rates. E-commerce landmarks were reached with unexpectedly strong online sales during the 1998-99 Christmas Holiday season, and the Department of Commerce began for the first time to segregate and track online retail sales statistics.[13] In addition to the mushrooming "dot.com" companies, major U.S. retailers and manufacturing companies began to migrate to the Internet for both business-to-business and business-to-consumer transactions. The financial services industry continued to see a need for electronic authentication legislation, and it was joined by other industries which shared a concern about the stifling effect that the patchwork quilt of state laws might have on e-commerce. Accordingly, when the 106th Congress convened in January 1999 there was a growing industry consensus that Congress should once again attempt to address itself to electronic authentication legislation. This time the effort was successful and resulted in the enactment of the E-Sign Act.

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[12] An identical measure was introduced March 17 by Rep. Merrill Cook (R-UT) in the House of Representatives as H.R. 3472 and referred to the House Committee on Banking and Financial Services. That bill also died in that committee.

[13] For a recent example of these reports, *see* Statement of U.S. Commerce Secretary Norman Y. Mineta on Commerce Department Release of E-Retail Sales Data, August 31, 2000 at http://www.census.gov/mrts/www/current.html.

### A. The Senate Effort: The Millenium Digital Commerce Act (S. 761)

By early February 1999, Senator Spencer Abraham (R-MI) became interested in introducing electronic authentication legislation. Senator Abraham, a Republican facing reelection in 2000, was an early advocate of technology issues, as demonstrated by his introduction in the prior session of Congress of the Government Paperwork Elimination Act,[14] which was successfully enacted. That measure, however, was limited in scope in that it only required the Office of Management and Budget ("OMB") to develop procedures for the use and acceptance of electronic signatures by the Executive Branch of the federal government. Senator Abraham wanted to build on this measure and the abortive Bennett bill with broader legislation that could significantly assist e-commerce. Accordingly, by mid-February 1999 discussions were underway to develop broader legislation which would give recognition and effect to electronic authentication and provide a baseline standard on which e-commerce companies could rely.

At the same time there was a growing awareness at the federal level of the emergence of the Uniform Electronic Transactions Act ("UETA"). This model legislation, designed to give validity and effect to electronic records, signatures, contracts and writings, was due to be adopted in final form by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") at its annual conference July 23-30, 1999. It was expected that following its approval by NCCUSL, numerous state legislatures would consider and enact UETA on a state-by-state basis. However, because

[14] Title XVII of Public Law 105-277.

of the concern that it might be years before there was widespread adoption of UETA at the state level, a concern compounded by the rapidity with which e-commerce was growing and Internet-related technology was changing, there was apprehension that UETA might not be implemented rapidly enough to answer the current needs of e-commerce. Thus, one of the purposes of the federal legislation was to serve as interim or "bridge" legislation until such time as the states enacted UETA.[15]

Within the relatively short period of just over one month, Senator Abraham introduced the "Millenium Digital Commerce Act" (S. 761) on March 25, 1999. Senate Commerce Committee Chairman John McCain (R-AZ), as well as Senators Ron Wyden (D-OR) and Conrad Burns (R-MT), joined Abraham in co-sponsoring the bill on a bipartisan basis. The measure was referred to only one committee, the Senate Commerce Committee. S. 761, as introduced, was "minimalist" in approach. [16] It provided that "a contract relating to an interstate transaction shall not be denied legal effect solely because an electronic signature or electronic record was used in its formation" (Section 6(a)). By limiting this operative provision to "contracts," the bill did not go as far as UETA in expressly providing validity and effect to both electronic signatures and electronic records. However, section 6(b) of S. 761 provided for party autonomy (and, at least implicitly, technology neutrality) by stating that the parties to an interstate transaction

[15] *See* S. Rep. No. 106-131, *Millenium Digital Commerce Act*, Report of the Committee on Commerce, Science, and Transportation on S. 761, at 2 (July 30, 1999).

[16] S. 761 incorporated several important principles contained in the Bennett bill from the prior Congress, including a minimalist approach that did not seek to allocate liabilities or establish new regulatory schemes but which established broad recognition and effect for electronic authentication and provided for technology neutrality. However, it differed from the Bennett bill in that it was not "bank-centric," applied more broadly to electronic records and contracts as well as authentication, contained definitions consistent

may establish by contract, electronically or otherwise, the technologies or business models they wish to use, including legal or other procedures, to create, use, receive, validate or invalidate electronic signatures and electronic records. On preemption, section 6(c) of S. 761 provided that the bill would not preempt the law of a state that enacted legislation governing electronic transactions that was consistent with sections 6(a) and (b) of the act and, moreover, provided that a state that enacted UETA "substantially as reported" to state legislatures by NCCUSL would satisfy this criterion, provided the legislation was not inconsistent with sections 6(a) and (b).

On April 29, 1999, Senators Abraham, McCain and Trent Lott (R-MS) introduced a companion bill, the "Electronic Securities Transactions Act" (S. 921). This legislation was specific to the securities industry and provided that registered broker-dealers, transfer agents and investment advisers could accept and rely upon electronic signatures on any application to open an account or other document. S. 921 was referred to the Senate Committee on Banking, Housing and Urban Affairs (the "Senate Banking Committee") but was never reported out of committee.[17]

The Senate Commerce Committee held an initial hearing on the legislation on May 27. Witnesses included representatives of Charles Schwab & Co., Inc., GTE Internetworking, the Information Technology Association of America and the

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with those in UETA and incorporated deference to UETA within the preemption provisions of the legislation.

[17] S. 921 was referred to the Senate Banking Committee because that committee has exclusive jurisdiction over securities issues. Indeed, the companion bill in the Senate was necessitated because the Senate Commerce Committee (unlike its analogue in the House) has no jurisdiction over securities issues.

Information Technology Division of the Commonwealth of Massachusetts. All witnesses favored the legislation.

On June 23 the Senate Commerce Committee met in a markup session to finalize the language of the bill before sending it to the floor and ordered the bill to be reported favorably with an amendment in the nature of a substitute by voice vote.[18] The amended version of S. 761 changed the bill as introduced by modifying section 6(a) to conform more closely to UETA by giving validity and effect to electronic records, signatures, contracts and writings. It also added an intent section at section 6(c) governing attribution of electronic records and electronic signatures to persons, a provision at section 6(d) governing use of electronic agents[19] and a new section 6(e) that modified the preemption provision by stating that "this section does not apply in any state in which the Uniform Electronic Transactions Act is in effect," thereby dropping the vaguer "substantially as reported" language as contained in prior section 6(c) of the bill as introduced. Significantly, the scope of the bill was modified by revising section 6(a) to apply only to a "commercial" transaction affecting interstate commerce, thereby eliminating governmental transactions which were more appropriately covered by the Government Paperwork Elimination Act.

[18] S. Rep. No. 106-131, *supra*.

[19] An "electronic agent" is a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part without review or action by an individual at the time of the action or response. *See* definition at section 106(2) of the E-Sign Act, S. 761, 106th Cong. § 106(2) (2000).

At first the Administration was supportive of S. 761. In a June 22, 1999 letter to Senator Abraham, Pincus stated:

> The substitute version of the S. 761 would in our view provide an excellent framework for the speedy development for uniform transactions legislation and an environment of partnership between the Federal Government and the states. We look forward to working with the Committee on the bill as it proceeds through the legislative process.

Consistent with this position, on August 4, 1999 the Office of Management and Budget issued a formal Statement of Administration Policy ("SAP") which declared "the Administration supports Senate passage of S. 761 …" The SAP went on to say:

> The Administration is pleased that the scope of S. 761 is limited to commercial transactions between private parties that affect interstate commerce. Further, the Administration applauds the preemption provisions of S. 761. Those provisions strike the appropriate balance between the needs of each state to develop its own laws relating to commercial transactions and the needs of the Federal Government to ensure that electronic commerce will not be impeded by the lack of national consistency in the treatment of electronic authentication.[20]

However, even after the Senate Commerce Committee's mark-up of S. 761, concerned parties continued to discuss changes to the bill. Most of these discussions centered on the formulation for preemption of state laws and the inclusion of "electronic records" in the bill, a provision that the Administration strongly opposed despite its earlier SAP in support of the bill.

Shortly after the Commerce Committee's reporting of S. 761, the measure also began to garner opposition from Senators Patrick Leahy (D-VT) and Paul Sarbanes (D-MD) because of its coverage of "electronic records" and alleged lack of consumer

[20] *See*, S. Rep. No. 106-131, *supra*.

protections. Because of Senate procedural rules that allow a single Senator to prevent legislation from moving to the floor, [21] S. 761 was held up for some months until Senator Abraham agreed in November to drop its coverage of electronic records and adopt a substitute amendment for the language of S. 761 offered by Senator Leahy and supported by Senator Sarbanes.[22] The Leahy substitute language, inserted into S. 761 on the Senate floor, was identical to a separate Democratic Leadership Amendment offered to H.R. 1714 on November 9 in the House by Minority Leader Richard Gephardt (D-MO) and co-sponsored by the senior Democrats on the House Banking (John LaFalce (D-NY)), Commerce (John Dingell (D-MI)) and Judiciary (John Conyers (D-MI)) Committees. That substitute, which had the endorsement of President Clinton, failed in the House by a vote of 276-128, with another 29 members not voting.[23] The Leahy amendment to S. 761, like its House counterpart, offered no effective preemption of state law or recognition of electronic records (see discussion of H.R. 1714 *infra*).[24]

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[21] Under Senate procedure, a "hold" is an informal practice by which a Senator informs his or her floor leader that he or she does not wish a particular bill or other measure to reach the floor for consideration. The Majority Leader need not follow the Senator's wishes, but it serves as a notice that the opposing Senator may filibuster any motion to proceed to consider the measure. A filibuster is the informal term for any attempt to block or delay Senate action on a bill or other matter by debating it at length, by offering numerous procedural motions or by any other delaying or obstructive actions. A cloture vote, however, can override a filibuster. *See* Senate website at www.senate.gov/learning/index.cfm.

[22] *See, e.g.*, Robert MacMillan, "Digital Signatures Bill Clears the Senate," *Post-Newsweek Business Information, Inc. Newsbytes*, November 19, 1999 and "Abraham To Drop Records Language from 'E-Sign' Bill, *National Journal's CongressDaily*, October 13, 1999.

[23] *See* 146 CONG. REC. H11749-H11754 (daily ed. Nov. 9, 1999).

[24] The Leahy language (section 5(a)) only extended legal validity to "contracts" and not to "records." Advocates of electronic commerce considered the inclusion of records—not just contracts containing records—in this legislation to be critical because of the number of documents, not deemed to be "contracts" for purposes of the law, which are integral to expanding electronic commerce and which need to be provided in electronic form. Moreover, the Leahy substitute specifically "denied" any "legal effect or enforceability" to contracts containing electronic records when "a law" exists which "requires that a contract be in writing," unless such records take a form which "can be retained" and which "can be used to prove the terms" of the contract (section 5(c)). The Leahy substitute also contained none of the specific language relating to the principles of uniformity and consistency found in H.R. 1714. On the contrary, sections 3(8) and 5(g) sunset the statute when "any State" adopts the UETA in a form "substantially similar" to the version presented to the states by NCCUSL. H.R. 1714, on the other hand, did not contain

On November 19, 1999 the Senate passed the Leahy substitute version of S. 761 by unanimous consent without a recorded vote.

### B. The House Effort: The Electronic Signatures in Global and National Commerce Act (H.R. 1714)

On May 6, 1999, House Commerce Committee Chairman Tom Bliley (R-VA), along with Reps. Tom Davis (R-VA), Billy Tauzin (R-LA) and Mike Oxley (R-OH), introduced the "Electronic Signatures in Global and National Commerce Act" ("the E-Sign Act") as H.R. 1714. The bill was initially referred solely to the House Commerce Committee. However, the House Judiciary Committee also obtained sequential jurisdiction over the bill.

Sections 101(a)(1) and (2) of the bill gave recognition and effect to electronic records and electronic signatures used in a contract or agreement entered into or affecting interstate or foreign commerce. Their validity was thus tied to their use in a contract or agreement.

Section 101(b) of the bill provided for party autonomy, while section 102 contained provisions dealing with preemption of state law. In brief, under section 102(a) a federal or state statute or regulation enacted after the date of enactment of the Act could

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the "substantially similar" language, and Section 102(b)(4) of that bill made expressly clear that no state

modify, limit or supercede the provisions of section 101 if it made "specific reference" to those provisions, specified "alternative procedures or requirements" for the use of electronic records or electronic signatures and, in the case of state statutes or regulations, was enacted within two years of the date of enactment of the federal act. Thus, the provision allowed future state override for a limited period and as long as it was consistent with section 101. It did not address existing state laws, only those enacted within two years following enactment of the bill. In addition, section 102(b) provided that any state statute or regulation that modified, limited or superceded section 101 would not be effective to the extent that it discriminated in favor of or against a "specific technology," discriminated in favor of or against a "specific type or size of entity," was not based on "specific and publicly available criteria" or was otherwise inconsistent with the provisions of section 101.

In addition, section 102(c) vested enforcement authority in the Department of Commerce by granting injunctive authority to Commerce to enjoin the enforcement of any nonconforming state statute or regulation. Section 103 provided specific exclusions to section 101 for statutes and regulations governing the creation and execution of wills, codicils or testamentary trusts, as well as governing adoption, divorce or other matters of family law.

The definitions used in the bill were partially based on the UETA definitions, except for the definition of "electronic signature."

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statute may be "otherwise inconsistent" with federal law in this arena.

Title II of the bill vested the Department of Commerce with a number of missions, including to study and report on foreign and domestic barriers to e-commerce, to negotiate away trade barriers to e-commerce, to pursue certain principles in international negotiations on e-commerce and to conduct a study on state statutes and regulations enacted after the date of enactment of the act to determine the extent to which they complied with section 102(b). Title III of the bill contained a separate securities section designed to provide validity and effect to electronic contracts, agreements and records as used by the securities industry.

Two subcommittees of the House Commerce Committee held hearings on H.R. 1714. The first was the Subcommittee on Telecommunications, Trade and Consumer Protection, which held its hearing June 9, 1999. Witnesses included Pincus, the Secretary of Technology of the Commonwealth of Virginia, Ford Motor Credit Company, the Deputy General Counsel of the Information Technology Division of the Commonwealth of Massachusetts, the President of Stamps.com, Inc., the President of IriScan, Inc. (testifying on behalf of the International Biometrics Association) and Capital One Financial Corporation. The second hearing, held by the Subcommittee on Finance and Hazardous Materials, was on June 24, 1999. It received testimony from Charles Schwab & Co., Inc., DLJ Direct Inc. and Quick & Reilly/Fleet Securities, Inc.

In an August 4, 1999 letter conveying the combined views of the Department of Commerce and Administration on H.R. 1714 to Chairman Bliley, Pincus stated that "we

support the overall goal of this legislation" but nonetheless went on to list a "number of significant problems with H.R. 1714 in its present form" which caused it to "fall short of achieving its goal." In particular, Pincus voiced concerns about the need to give "significant deference" to state law and to the NCCUSL process. Pincus stated that "section 102 of H.R. 1714, … places significant, and we believe inappropriate, limits upon states' ability to alter or supercede the federal rule of law that the bill would impose. Even when states adopt the UETA, their laws would remain subject to federal preemption 'to the extent' that any State rule – including the UETA – fails to meet a number of criteria, which in themselves are not clearly defined." Pincus observed that "most significantly," section 102(b) "takes away" the authority of states to avoid federal preemption that is granted by subsection (a) of that section. Pincus also objected to the enforcement authority of the Department of Commerce as "counterproductive." Other issues raised by Pincus in the letter included the need to exclude government transactions, the need to limit the scope of the bill to "commercial" transactions affecting interstate commerce rather than "any contract or agreement" affecting interstate commerce (thus aligning its scope with that of S. 761) and the need to retain the ability of governments to regulate "certain private party transactions in the public interest" notwithstanding the party autonomy provision.[25]

The two House Commerce Subcommittees subsequently met on July 21 and 29 to mark up the bill, and on August 5, 1999 the full Committee met and ordered H.R. 1714 reported to the House, as amended by a voice vote, but with no recorded votes taken.

[25] Letter from Andrew J. Pincus, General Counsel, Department of Commerce to the Honorable Tom Bliley,

The version of H.R. 1714 reported out of the Commerce Committee was essentially the same as the bill as introduced, with some modifications. The differences between the original and reported versions of the bill included revision of the preemption formula in section 102(a) to cover an enactment of UETA "as reported to the State legislatures" by NCCUSL, expansion from two to four years of the grace period within which a state may enact a law that is not preempted by section 102(a), modification of the definition of "electronic signature" to accord more closely with that in UETA and the addition of a definition and provision dealing with "electronic agents."

In explaining inclusion of the modified preemption provision, the Committee Report stated that:

> The Committee commends NCCUSL's work on UETA. Both UETA and H.R. 1714 share many of the same basic principles. The Committee remains concerned, however, about the prospect for adoption of UETA by the States. Failure to adopt UETA by a substantial majority of the States in a short time period will perpetuate a patchwork of inconsistent and conflicting state laws. Further, some states will inevitably choose not to follow the work of NCCUSL on electronic signatures and will develop their own standards, which may or may not be compatible with UETA or may even be harmful to the development of electronic signatures if designed or implemented incorrectly.
>
> There is, therefore, a clear need for a uniform, nationwide legal standard to be in place until states have the opportunity to enact their own laws or to ensure that there is a nationwide legal standard in case states fail to or refuse to enact their own electronic signature legislation. H.R. 1714 fills this need.[26]

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Chairman, Committee on Commerce, House of Representatives, August 4, 1999.

[26] H. Rep. No. 106-341, Part 1, House Committee on Commerce Report to Accompany H.R. 1714, "Electronic Signatures in Global and National Commerce Act" (September 27, 1999).

The sequential handling of H.R. 1714 by the House Judiciary Committee resulted in no changes to the text of the bill. On September 30, 1999 the Committee's Courts and Intellectual Property Subcommittee held a hearing on H.R. 1714. Immediately prior to the hearing, Judiciary staff prepared a draft revised version of H.R. 1714 in the nature of a substitute amendment (the "Coble amendment," named after Subcommittee Chairman Howard Coble (R-NC)).[27] At the same time, Rep. Howard Berman (D-CA), ranking minority member of the Subcommittee, produced a draft amendment to the Coble amendment which essentially gutted the substantive provisions of the legislation.[28] Witnesses at the Subcommittee's September 30 hearing included Pincus, as well as representatives from the Department of Justice, NCCUSL, Hewlett-Packard, National Association of Manufacturers ("NAM") and National Consumer Law Center, Inc. The testimony of most of the witnesses was critical of both the Bliley and Coble versions of the bill, with Pincus' testimony repeating many of the objections raised in his earlier letter to Chairman Bliley.

The Subcommittee met for markup on October 7, 1999 and ordered the Coble amendment version of H.R. 1714 favorably reported by a voice vote. However, at the full Committee markup on October 13, the Committee adopted the Berman amendment by a vote of 15 to 14, with Reps. Bob Barr (R-GA) and Lindsey Graham (R-SC) breaking ranks with the other Republicans to support the Berman amendment.[29]

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[27] *See* the dissenting views of Congressman Coble in H. Rep. No. 106-341, Part 2, Report of the Committee on the Judiciary to Accompany H.R. 1714, "Electronic Signatures in Global and National Commerce Act," (October 15, 1999) at 17-19.

[28] *Id*.

[29] *Id*. In addition, Republican Reps. Jim Sensenbrenner (R-WI) and Bill McCollum (R-FL) were absent and did not vote.

The two competing versions of H.R. 1714 were then referred to the House Rules Committee which ultimately decided to move Bliley's Commerce Committee version of the bill to the floor rather than the Judiciary Committee version.[30]

The Judiciary Committee's attempt to influence the legislation was perhaps most significant for the public debut at the September 30 hearing of consumer advocates in the debate over the E-Sign Act. Because of the important role played by consumer concerns in the eventual development of the E-Sign Act, a brief summary of the criticisms made by the National Consumers Law Center, Inc. of H.R. 1714 is instructive. NCLC Managing Attorney Margot Saunders stated in her September 30 testimony before the Coble Subcommittee (she followed up with a white paper entitled "Major Issues Regarding H.R. 1714") that there was "considerable risk" to consumers in H.R. 1714. As examples, she cited her belief that H.R. 1714 "would permit electronic disclosures to substitute for paper notices even when the consumer doesn't know that he or she has consented through electronic communication, doesn't have a computer, or can't print the information when it is received" and that "the bill directs the courts to give electronic signatures the same weight as their handwritten counterparts without addressing the heightened risks of forgery, duplication and identity theft evident in today's online marketplace." As remedies, Ms. Saunders argued that electronic contracts should only be allowed to replace paper contracts when the transaction "truly occurs" in electronic commerce and that electronic contracts should not be permitted to replace paper contracts when the

transaction has actually occurred in person. She also argued, importantly, that the "consumer must have the capacity to receive, retain and print the electronic contract" and that "specific rules" should be developed to "ensure that the consumer continues to have the capacity and willingness to receive the electronic records."[31]

Concurrently with the activation of consumer groups in the debate, Senators Wyden and Leahy began to develop additional consumer-oriented provisions to insert in the legislation beyond those already in the bill. Although this Wyden-Leahy language was not publicly released until far later in the legislative process when the two bills were about to go to conference,[32] the Wyden-Leahy draft contained several dozen consumer-oriented changes to H.R. 1714,[33] including in particular the electronic consent provisions which the Administration and Democratic Senators came to view as non-negotiable and which were ultimately incorporated into section 101(c) of the final enacted version of the E-Sign Act.[34]

In an October 12, 1999 letter to House Judiciary Committee Chairman Henry J. Hyde (R-Ill.), Pincus stated that H.R. 1714, as amended in the Coble Subcommittee (but

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[30] "E-Sign Bill Due Up Today on Suspension Calendar," *National Journal's CongressDaily*, October 26, 1999.
[31] *See* Comments to the Subcommittee on Courts and Intellectual Property, House Judiciary Committee, Regarding H.R. 1714 (the "Electronic Signatures in Global and National Commerce Act"), September 30, 1999 by Margot Saunders, Managing Attorney, National Consumer Law Center, Inc.
[32] A conference committee is a temporary, ad hoc panel composed of House and Senate conferees which is formed for the purpose of reconciling differences in legislation that has passed both chambers. Conference committees are usually convened to resolve bicameral differences on major and controversial legislation. *See* Senate website, *supra*.
[33] *See* Wyden Draft Modifications to H.R. 1714 (undated).
[34] *See, e.g.*, "E-Signature Bill Conferees Expected To Finally Meet Today," *National Journal's CongressDaily*, May 18, 2000, and "Summers, Daly Outline Goals on E-Sign Bill," *National Journal's CongressDaily*, April 28, 2000.

not as approved the following day by the full Judiciary Committee),"would still preempt state law unnecessarily, both in degree and duration; invalidate numerous state and federal laws and regulations designed to protect consumers and the general public; and otherwise create legal uncertainty where predictability is the goal. We therefore must strongly oppose the measure in its current form." In addition to stating that the Administration did not "understand why it is necessary to override existing federal laws governing commercial transactions," Pincus viewed H.R. 1714 as placing "inappropriate limits upon states' ability to alter or supercede the federal rule of law ..." Pincus argued that the legislation should be limited to a temporary federal rule to ensure the validity of electronic agreements entered into before states have a chance to enact the UETA. Once UETA is adopted by a state, Pincus argued, "the federal rule is unnecessary, and it should 'sunset.'" In addition to a number of other objections to the bill, Pincus also raised the consumer issue: "Consumer protection is another important area where the public interest has been found to require government oversight. States, as well as the federal government, must not be shackled in their ability to provide safeguards in this area. Yet this is precisely what this legislation would do." In a footnote in the letter, Pincus signaled a shift in the Administration's position:

> The provisions are similar to some contained in S. 761, as reported by the Senate Commerce Committee. I expressed support for that measure because it ensured that contracts could not be invalidated because they were in electronic form or because they were signed electronically. At the time that the bill was reported, the spillover effect of these provisions on existing consumer protection and regulatory standards had not been identified. Now that this effect has become clear, and it is equally clear that enactment of this measure is desired by some

precisely because of the spillover effect, we must oppose these provisions as currently drafted.[35]

A further development in the dynamic of the legislation process that occurred during this period of late October and early November, 1999 was the sudden interest taken in the legislation by an expanded group of representatives of the financial services industry. Although certain financial services companies and trade associations had long been involved in the debate over the E-Sign bill, prior to this time the financial services industry as a whole had been focused on obtaining Congressional passage of the Financial Services Modernization Act. However, with that project behind it,[36] the broader financial services industry awoke to the importance of the E-Sign Act. A variety of banking and insurance trade associations, as well as a number of their individual members, began to engage on the issue.

The House of Representatives passed H.R. 1714 by a 356 to 66 vote on November 9. The key to this vote was a coalition of Republicans and some 65 so-called "New Democrats" (many from suburban and "high tech" districts and thus inclined to be more sensitive to the issues surrounding e-commerce than traditional urban Democrats).[37] In enacting the bill, the House rejected a substitute measure backed by the Administration and offered by House Majority Leader Richard Gephardt, Rep. John Dingell (Ranking Democrat on the Commerce Committee), Rep. John Conyers (Ranking Democrat on the Judiciary Committee) and Rep. John LaFalce (Ranking Democrat on the Banking

[35] Letter from Andrew J. Pincus, General Counsel, Department of Commerce, to the Honorable Henry J. Hyde, October 12, 1999.
[36] The Financial Services Modernization Act, Pub. L. No. 106-102, 113 Stat. 1338, was signed into law by the President on November 12, 1999.

Committee).[38] That substitute was based on the proposed compromise in the Senate (see *supra*) and would have provided no effective recognition of electronic records or preemption of state law.

In addition to its other provisions described above, the bill incorporated new detailed consumer protection provisions which were added by a floor amendment offered by Rep. Jay Inslee and other New Democrats immediately prior to its passage as part of the compromise between the Republicans and New Democrats to assemble the votes to ensure its passage. These requirements stated that if a law requires a record to be provided to a consumer in writing, that requirement is satisfied by an electronic record if (i) the consumer has affirmatively consented by means of a consent that is "conspicuous and visually separate from" other terms to the use of such electronic record and has not withdrawn that consent, (ii) prior to consenting, the consumer has been provided with a statement of the hardware and software requirements for access to and retention of electronic records and (iii) the consumer has affirmatively agreed to notify the provider of the electronic record of any change in the consumer's e-mail address and to give an e-mail address or other location to which the provider may send records if the consumer withdraws consent. In addition, the record must be capable of review, retention and printing by the recipient if accessed using the hardware and software specified at the time

[37] Key New Democrats involved in this effort included Rep. Jay Inslee (D-WA), Jim Moran (D-VA), Cal Dooley (D-CA) and Anna Eshoo (D-CA).
[38] *See* 146 CONG. REC. H11749-H11754, s*upra.*

of the consumer's consent. (Section 101(b)(2)). The content or timing of any disclosure required to be provided to any consumer under law was not affected (Section 101(e)).[39]

As Congress recessed for the Christmas and Hanukah holidays, the scene was therefore set for the two bills to go to Conference Committee early in the new year.

The House of Representatives appointed its conferees on February 16, 2000, shortly after Congress returned from recess.[40] The appointment of Senate conferees was delayed for six weeks. On March 29 the Senate appointed its delegation to the conference, naming 17 members from three Senate Committees -- Commerce, Banking and Judiciary.[41] The two passed measures, H.R. 1714 and S. 761, provided the initial frame of reference for the Conference Committee's work. These two bills, as they stood at the time of the naming of the conferees, contrasted sharply with each other.

The Conference Committee initiated its work in early May. The text of the House-passed H.R. 1714, renumbered as S. 761, served as the base document for the Committee's work. The Conference Committee produced its final report on June 8,[42] the

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[39] 146 CONG. REC. H11749-H11754, s*upra*.

[40] *See* "House Moves To Conference With Senate on E-Sign Bills," *National Journal's CongressDaily*, February 17, 2000. The House conferees were Chairman Bliley, and Reps. Tauzin and Oxley (on the Republican side), and Reps. Dingell and Markey (on the Democratic side).

[41] *See* "Senate Taps E-Sign Conferees," *National Journal's CongressDaily*, March 29, 2000. Senate representatives were, from the Commerce Committee: Chairman John McCain, Ted Stevens (R-AL), Conrad Burns, Slade Gorton (R-WA), Kay Bailey Hutchinson (R-TX), Spencer Abraham, Ranking Democrat Ernest F. "Fritz" Hollings (D-SC), Daniel K. Inouye (D-HI), John D. "Jay" Rockefeller (D-WV), John F. Kerry (D-MA), and Ron Wyden (D-OR).

Representing the Senate Banking Committee were Chairman Phil Gramm, Robert F. Bennett, and Ranking Democrat Paul Sarbanes; Senate Judiciary Committee members were Chairman Orrin Hatch (R-UT), Strom Thurmond (R-SC), and Ranking Democrat Patrick Leahy.

[42] H. Rep. No. 106-661, *Electronic Signatures in Global and National Commerce Act*, June 8, 2000.

House thereupon passed the bill by an overwhelming 426-4 vote on June 14, and the Senate did the same by a vote of 87-0 on June 16. It then went to President Clinton for signature.

However, unlike most legislation, the E-Sign Act, by the decision of the majority of the conferees, has a conference report which is simply the text of the Act, with no accompanying statement of managers.[43] Therefore, there is no dispositive legislative history to illuminate what the text of the E-Sign Act is intended to mean. Although a number of conferees engaged in extended colloquies and inserted statements into the *Congressional Record* on the floor, their eventual legal significance as legislative history is unclear.[44]

[43] A "statement of managers" is a section of a conference report (the final version of a bill proposed by House and Senate conferees) which provides a section-by-section explanation of the agreement. Normally included as part of the conference report, the statement of managers is an important element of the legislative history of an act.

[44] The weight accorded floor statements will depend on the court interpreting them. *See* e.g., concurring opinion of Justice Scalia in Thompson v. Thompson, 484 U.S. 174 (1988), in which he stated: "Committee reports, floor speeches, and even colloquies between Congressmen … are frail substitutes for bicameral vote upon the text of a law and its presentment to the President." [484 U.S. 174, 192].

## Part II. S. 761 Electronic Signatures in Global and National Commerce Act

### 1. Title I—Electronic Records and Signatures in Commerce

Section 101. General Rule of Validity

*Section 101(a): general rule of validity*. Section 101(a) establishes the general rule of validity for electronic signatures, contracts and records. It is based on Section 7 of UETA.[45] It sets forth the fundamental premise of the Act that the medium in which a record, signature or contract is created, presented or retained does not affect its legal significance. The fact that the information is set forth in an electronic, as opposed to paper, form is irrelevant.

Section 101(a) provides that "Notwithstanding any statute, regulation or other rule of law, … a signature, contract, or other record" relating to a transaction[46] in or affecting

[45] Section 7 of UETA states "(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form. (b) A contract may not be denied legal effect or enforceability solely because it is in electronic form. (c) If a law requires a record to be in writing, an electronic record satisfies the law. (d) If a law requires a signature, an electronic signature satisfies the law."

[46] *See* S. 761, 106th Cong. §106(13) (2000) (defining "transaction"). Consistent with plain language of the statute, the conferees specifically rejected including "governmental" affairs in the definition of "transaction." 146 CONG. REC. S5165, 5221 (2000) (statement of Sen. Leahy). "Even though some aspects of such governmental transactions…are commercial in nature, they are not covered by this because they are part of a uniquely governmental operation. 146 CONG. REC. S5165, 5229 (2000) (statement inserted into the Congressional Record by Sen. Sarbanes (D-Md.)), *Statement of Senators Hollings, Wyden and Sarbanes Regarding the Electronic Signatures in Global and National Commerce Act*) (hereinafter, the "Hollings, Wyden and Sarbanes Statement"). Rep. Dingell also inserted a statement which is virtually a verbatim repetition of the Hollings, Wyden and Sarbanes Statement and included the language, *supra*, on government transactions. 146 CONG. REC. H4341, 4357 (2000) (statement of Rep. Dingell.) The Hollings, Wyden and Sarbanes Statement was offered in an effort to clarify and rebut, from the Democratic perspective, certain interpretations of the E-Sign Act advanced by Republican conferees in colloquies on the floor. 146 CONG. REC. S5165, 5229 (2000) (statement of Sen. Sarbanes). Senator Wyden, who himself offered explanations, commented that "I believe it is important to the legislative history to say a

interstate commerce "may not be denied legal effect, validity, or enforceability solely[47] because it is in electronic form."[48] Moreover, a contract relating to such transactions "may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation."[49]

This subsection reflects the E-Sign Act's intention to operate broadly to permit the use of electronic signatures in a wide range of business, consumer, commercial, financial and governmental contexts.[50] Although generally clear in its UETA-based wording, there is a question as to what is meant by the term "any other rule of law," which is not found in UETA. It would appear that this term was meant as a "catch-all"

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brief word about the process. This is necessary because, unfortunately, statements are being made or inserted in the RECORD and colloquies are being offered that seek to weaken, undermine and even directly contradict the actual words of the text of the Conference Agreement. This appears to come from some quarters that do not share the majority view of those who signed the Conference documents. As one of the principal sponsors of the Senate measure, S. 761, I am compelled to point out that the actual text of the legislation can and should stand on its own." 146 CONG. REC. S5165, 5216 (2000) (statement of Sen. Wyden.) As noted above, there was no statement of managers that would have provided interpretive guidance on the E-Sign Act.

[47] "The Conferees added the word "solely" in both sections 101(a)(1) and (2) to ensure that electronic contracts and signatures are not inadvertently immunized by this Act from challenge on grounds other than the absence of a physical writing or signature." 146 CONG. REC. S5165, 5229 (2000) (the Hollings, Wyden and Sarbanes Statement). "[S]olely truly means 'solely or in part.'" 146 CONG. REC. S5281, 5283 (2000) (statement inserted into the Congressional Record by Senator Abraham, *Explanatory Statement of S. 761, The "Electronic Signature in Global and National Commerce Act"*) (hereinafter, "Abraham Explanatory Statement"). Chairman Bliley inserted a statement which is almost a verbatim repetition of the Abraham Explanatory Statement and was offered for the same purpose: "The following statement is intended to serve as a guide to the provisions of the conference report accompanying S. 761, the Electronic Signatures in Global and National Commerce Act." 146 CONG. REC. H4341, 4352 (2000) (statement of Chairman Bliley) (hereinafter, the Bliley Explanatory Statement). However, Senator Leahy sought to place the Bliley Explanatory Statements in perspective: "I note that I saw in the CONGRESSIONAL RECORD of the House proceedings a statement by Chairman BLILEY that is formatted like a managers' statement of a conference report. I feel I must clarify that those are Mr. BLILEY'S views, not a statement of the managers." 146 CONG. REC. S5165, 5220 (2000) (statement of Sen. Leahy).

[48] S. 761, 106th Cong. §101(a)(1) (2000).

[49] S. 761, 106th Cong. §101(a)(2) (2000).

[50] Although not spelled out in the text of the Act, it should cover unilateral actions by one of the parties to a transaction or by any other person with an interest in the transaction. Thus, it should cover, for example, activities relating to the establishment or operation of an employee benefit plan, such as an Individual Retirement Account ("IRA"), section 403(b) annuity or an education savings program, some of which activities might be unilateral in nature, such as establishment of trusts.

designed to expand the scope of the general rule of validity rather than to apply to any specific type of legal authority. However, it arguably might cover a legal rule which is less than or different from a full statute or regulation, such as a phrase within a statute or regulation, or a court ruling or agency guidance short of a regulation.

*Section 101(b): preservation of rights and obligations*. Section 101(b) (1) acknowledges that Title I affects only requirements in statutes, regulations, or rules of law that contracts or other written records be written, signed or in nonelectronic form. Laws -- including common law rules -- that prohibit fraud, unfair or deceptive trade practice or unconscionable contracts are not affected by the E-Sign Act."[51] Further, section 101(b) (2) clarifies that Title I does not require any person to agree to use or accept electronic records or electronic signatures other than a governmental agency with respect to a record other than a contract to which it is a party.[52]

Consent to use of electronic media is thus voluntary.[53] In contrast, section 5(b) of UETA provides that it "applies only to transactions between parties each of which has agreed to conduct transactions by electronic means."[54] Congress presumably was

[51] S. 761, 106th Cong. §101(b)(1) (2000). *See* 146 CONG. REC. S5165, 5221 (2000) (statement of Sen. Leahy).
[52] S. 761, 106th Cong. §101(b)(2) (2000).
[53] S. 761, 106th Cong. §101(c)(1) (2000). "But the bottom line is that nothing requires an American to use the service of the Internet or to use this bill to sign electronically for purchases and sales. This is purely voluntary. It is an opt-in system. We have to consent to it." 146 CONG. REC. H4341, 4348 (2000) (statement of Rep. Tauzin). "[E]ngaging in electronic transactions is purely voluntary. No one will be forced into using or accepting an electronic signature or record. Consumers that do not want to participate in electronic commerce will not be forced or duped into doing so." 146 CONG. REC. H4341, 4348 (2000) (statement of Chairman Bliley).
[54] Although section 101(b) implicitly incorporates certain "party autonomy" principles by stating the voluntary nature of using and accepting electronic signatures and records, it falls short of an express party autonomy provision. UETA includes, and earlier versions of the E-Sign Act included, broader and non-

familiar with the phrasing in UETA (and perhaps the earlier drafts of the E-Sign Act) and meant for the E-Sign Act to establish a different rule from UETA. Does section 101(b)(2) mean that the parties do not have to agree affirmatively to use electronic records or electronic signatures but that a party may object to the use electronic records and signatures? Alternatively, might Congress have intended by section 101(b)(2) to require affirmative agreement of the parties to use or accept electronic records and signatures, notwithstanding the phrasing?

In this connection, is it significant that section 101(c) requires affirmative consumer consent to the provision of certain kinds of records? On the one hand, one might argue that section 101(c) is the only place in the E-Sign Act where consent of any form is expressly required, implying that no affirmative consent is required from anyone, consumer or not, in other contexts, including section 101(b). On the other hand, one might argue that the sole purpose of section 101(c) is to set forth more stringent disclosure and consent requirements to ensure that consumers do not give consents to the

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explicit language preserving the principle of party autonomy, specifically allowing parties to a contract to establish acceptable procedures or requirements regarding the use and acceptance of electronic records and electronic signatures. However this language was not included in the final E-Sign Act.

Like technology neutrality, the principle of party autonomy is enshrined in UETA and enjoys wide acceptance as a necessary attribute in the e-commerce community. It is a market-oriented approach that reflects the state common law disposition to allow private parties the maximum flexibility in contracting and ordering their own affairs without government interference. Moreover, the principle of party autonomy, like that of technology neutrality, is expressly endorsed in the Administration's July 1, 1997 "Framework for Global Electronic Commerce," which is the charter document on U.S. policy on electronic commerce. The Framework states that "parties should be free to order the contractual relationship between themselves as they see fit." Consistent with this policy and as noted in the 1999 Second Annual Report of the U.S. Working Group on Electronic Commerce, "Towards Digital Equality," the United States has pressed other countries to develop commercial law frameworks that "reaffirm the rights of parties to a transaction to determine the appropriate technological means of authenticating their agreements." The principle of party autonomy also was embodied in the Declaration on Authentication adopted by the 1998 OECD Conference on Electronic Commerce in Ottawa and in Joint Statements by the United States with the United Kingdom, Korea, Australia, Japan and France.

use of technologies that they cannot, in fact, access. One frequently proffered example of this concern contemplates an unsophisticated consumer who owns no computer contracting with a car dealership for the purchase of a vehicle, on the dealer's premises and using the dealer's computer, and inadvertently agreeing to use an Internet browser or email to access or receive important records relating to that transaction.

If affirmative agreement is required, how must such an agreement be manifested? Section 5(b) of UETA states that "[w]hether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct." Can an implied agreement under the E-Sign Act be demonstrated by the actions of the parties (*i.e.*, voluntary use or acquiescence in the use of electronic means), even in the absence of a provision similar to section 5(b) of UETA? Can express agreement be a provision of the larger agreement into which the parties are entering electronically?

If no affirmative agreement is required, but parties are entitled to refuse to use electronic records and electronic signatures (*i.e.*, "opt-out"), how and when is such "opt-out" required to be manifested?

*Section 101(c): consumer disclosures*. Section 101(c) is an important provision which imposes significant consumer[55] disclosure and consent provisions with respect to

[55] "The term 'consumer' means an individual who obtains, through a transaction, products or services which are used primarily for personal, family, or household purposes, and also means the legal representative of such an individual." S. 761, 106th Cong. §106(1) (2000). "It is well worth noting that the

electronic records, which were among the more contested elements of the bill during its consideration by Congress. Section 101(c)(1) allows for an electronic record to be used when "a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing" if the following four criteria, outlined in 101(c)(1)(A-D), are satisfied. [56]

*First*, the consumer must affirmatively consent to such use and must not have withdrawn such consent.[57]

*Second*, the consumer must be provided with "a clear and conspicuous statement"[58] which meets four conditions, *viz*:

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term "consumer" does not include business-to-business transactions, which will allow businesses to take full advantage of the efficiency opportunities presented by this legislation." 146 CONG. REC. S5165, 5216 (2000) (statement of Sen. Abraham). "Section 101(c)(1) refers to writings that are required to be delivered to consumers by some other law, such as the Truth-in-Lending Act. The reference to consumers is intentional: subsection (c) only applies to laws that are specifically intended for the protection of consumers. When a statute applies to consumers as well as to non-consumers, subsection (c)(1) should not apply. In this way, the subsection preserves those special consumer protection statutes enacted throughout this Nation without creating artificial constructs that do not exist under current law. At no time in the future should these 'consent' provisions of 101(c), which are intended to protect consumers (as defined in this legislation), be permitted to migrate through interpretation so as to apply to business-to-business transactions." 146 CONG. REC. S5165, 5284 (2000) (Abraham Explanatory Statement). However, the Democratic conferees took a different view. "It is the Congress' intent that the broadest possible interpretation should be applied to the concept of consumer. The definition in Section 106(1) is intended to include persons obtaining credit and insurance, even salaries and pensions—because all of these are 'products or services which are used primarily for personal, family, or household purposes' as the word is defined in the Act." 146 CONG. REC. S5165, 5230 (2000) (Hollings, Wyden and Sarbanes Statement).

[56] S. 761, 106th Cong. §101(c)(1) (2000). "[T]he Act does not create new requirements for electronic commerce but simply allows disclosures or other items to be delivered electronically instead of on paper. This means that if a consumer protection statute requires delivery of a paper copy of a disclosure or item to a consumer, then the consent and disclosure requirements of subsection (c)(1)(A-D) must be satisfied. Otherwise, subsection (c) does not disturb existing law." 146 CONG. REC. S5281, 5284 (2000) (Abraham Explanatory Statement).

[57] S. 761, 106th Cong. §101(c)(1)(A) (2000). The Act provides no guidance on how to handle consents in the context of joint accounts. It is unclear whether one or both account holders must consent and, if the

(i) It must inform the consumer of "any right" or option to have a record provided or made available in a nonelectronic form and of his or her right to "withdraw the consent to have the record provided or made available in electronic form and of any conditions, consequences (which may include termination of the parties' relationship), or fees in the event of such withdrawal…;"[59]

(ii) It must inform the consumer of whether the consent applies only to a particular transaction which gave rise to the obligation to provide the record or to the entire course of the parties' relationship;[60]

(iii) It must describe the procedures for withdrawing consent and for changing a consumer's electronic contact information;[61] and

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latter, how such consent by different parties can be physically made and received with any degree of certainty from a single e-mail address.

[58] S. 761, 106th Cong. §101(c)(1)(B) (2000). There is no guidance in the E-Sign Act on how specific the statement must be with respect to the four items listed *infra* or what format or wording it must use. Presumably it could be provided either electronically or by paper. Or must it be provided or made available in the same manner that the electronic records will be? In what way must it be "clear and conspicuous?"

[59] S. 761, 106th Cong. §101(c)(1)(B)(i) (2000). The use of the term "any right" suggests that there may be no right to receive paper records, which is in fact reflective of existing law. Prior drafts of this language had included such a right, but the conferees modified it to the current formulation.

[60] S. 761, 106th Cong. §101(c)(1)(B)(ii) (2000). The E-Sign Act does not define "particular transaction" or "entire course of the parties" relationship.

[61] S. 761, 106th Cong. §101(c)(1)(B)(iii) (2000). Consistent with Footnote 59, *supra*, the use of the word "may" should not imply that there is a right to obtain a paper record, only that this is how the consumer would go about doing it if the paper record were made available.

> (iv) It must inform the consumer of how, upon request, the consumer "may" obtain a paper copy of an electronic record and whether any fee will be charged in connection therewith.[62]

These requirements raise a number of practical questions. Does the language in section 101(c)(1)(B)(i)(I) (by using the term "any right" instead of "the right") imply that a company may refuse to do business with consumers that do not consent to the receipt of records in electronic form? That conclusion appears to be the implication because a party able to terminate a relationship if the consumer revokes his or her consent should be able to condition creation of the relationship on consent to electronic receipt of required records. Therefore, does the language imply that a consumer who has consented to electronic delivery of records also always has a right to have those records provided or made available in nonelectronic form? Or does the language merely require a statement as to whether or not the company will make such records available? Does a company have the ability to deny access to paper records? It appears under section 101(c)(1)(B)(iv) that the company possibly might have a continuing obligation to make paper copies of electronic records available on request, even if consent is not withdrawn, although the company may charge a fee for such access. On the other hand, use of the word "may" in this subsection is permissive and suggests that the right to a paper copy is optional. It does not appear that the disclosure must state the actual amount of the fee.

[62] S. 761, 106th Cong. §101(c)(1)(B)(iv) (2000).

How specific must the statement be with respect to the section 101(c)(1)(B)(ii) disclosure of "conditions, consequences (which may include termination of the parties' relationship), or fees" in the event of a consumer's withdrawal of consent? A clear and conspicuous statement of the fees that will have to be paid as a result of a withdrawal of consent may be impracticable, as companies will not be able to predict with accuracy the fees that might apply at a point which may be years in the future (this issue reappears in section 101(c)(1)(D)).

In addition, section 101(c)(1)(B)(ii) requires that the statement inform the consumer of whether the consent applies to the particular transaction which gave rise to the obligation to provide the record or other categories of records arising during the entire course of the parties' relationship. How specific must the statement be with respect to the subject of the consumer consent? What is considered a "particular transaction?" When is a new transaction created? What constitutes a "new transaction?" For example, one might argue that the purchase of one policy of insurance is a "transaction" that gives rise to on-going records delivery requirements, including policy renewal notices, annual statements and the like, and that other "transactions" arising in the course of the parties' relationship would include such matters as the purchase of additional policies. Alternatively, one might argue that the "transaction" is the initial purchase of a policy and that the consent would address records delivery requirements relating only to the purchase (*e.g.*, delivery of the written policy) but that later events such as policy renewals and claims adjudications would be other "transactions" that would arise in the "course of the parties' relationship." Either interpretation does not answer the question of how specific the

disclosure must be about the "categories of records" to which the consent applies. Moreover, it may be difficult in practice for the party obtaining the consent to identify at the outset all of the possible categories of records that could arise during the course of the parties' relationship.

*Third*, prior to consenting, the consumer must be provided with a "statement of the hardware and software requirements for access to and retention of the electronic records."[63]

There also is some question as to how specific this statement of hardware and software requirements must be. Can the provider simply inform the consumer that he or she needs a computer and access to the Internet or is something more required, such as a statement that the consumer needs Windows 98? If a range of hardware or software allows access, must the statement be illustrative or does it have to be exhaustive? What precisely is meant by "access to" and "retention of?"

The consumer is then required to consent electronically, or confirm his or her consent electronically, "in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent."[64]

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[63] S. 761, 106th Cong. §101(c)(1)(C)(i) (2000).

[64] S. 761, 106th Cong. §101(c)(1)(C)(ii) (2000). "Section 101(c)…requires the use of a technological check, while leaving companies with ample flexibility to develop their own procedures….Senator Gramm has criticized the conference report on the grounds that its technological check on consumer consent unfairly discriminates against electronic commerce. But those most familiar with electronic commerce have never seriously disputed the need for a technological check. In fact, many high tech firms have acknowledged

As noted *supra*, this provision came from the Wyden-Leahy proposal and ultimately appears to be based on a requirement articulated by the National Consumer Law Center, Inc. There are questions as to how difficult this procedure will be in practice and as to what constitutes a "reasonable demonstration" that the consumer can access the information. There also is a question of whether it unnecessarily limits the effectiveness

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that it is good business practice to verify that their customers can open their electronic records, and many already have implemented some sort of technological check procedure. I am confident that the benefits of a one-time technological check far outweigh any possible burden on e-commerce, and it will greatly increase consumer confidence in the electronic marketplace." 146 CONG. REC. S5165, 5220 (2000) (statement of Sen. Leahy). By means of section 101(c)(1)(C)(ii) "the conferees sought to provide consumers with a simple and efficient mechanism to substantiate their ability to access the electronic information that will be provided to them." 146 CONG. REC. S5281, 5282 (2000) (McCain/Abraham colloquy). *See also* 146 CONG. REC. H4341, 4360 (2000) (Markey/Bliley colloquy). However, the conferees claimed that they did not intend for the "reasonable demonstration" standard to burden the consumer or the person providing the record. 146 CONG. REC. S5281, 5282 (2000) (McCain/Abraham colloquy). *See also* 146 CONG. REC. H4341, 4360 (2000) (Markey/Bliley colloquy). An e-mail response from a consumer that confirmed that the consumer can access electronic records in the specified formats would satisfy the 'reasonable demonstration' requirement." 146 CONG. REC. S5281, 5282 (2000) (McCain/Abraham colloquy). *See also* 146 CONG. REC. H4341, 4360 (2000) (Markey/Bliley colloquy). An affirmative response to an electronic query asking if the consumer can access the electronic information or if the affirmative consent language includes the consumer's acknowledgement that the consumer can access the electronic information in the designated format satisfies the 'reasonable demonstration' requirement. 146 CONG. REC. S5281, 5282 (2000) (McCain/Abraham colloquy). *See also* 146 CONG. REC. H4341, 4360 (2000) (Markey/Bliley colloquy). The requirement can also be satisfied if it is shown that the consumer actually accesses electronic records in the relevant format. 146 CONG. REC. S5281, 5282 (2000) (McCain/Abraham colloquy). *See also* 146 CONG. REC. H4341, 4360 (2000) (Markey/Bliley colloquy) and 146 CONG. REC. S5281, 5284 (2000) (Abraham Explanatory Statement). The process of obtaining consumer consent has been described as a "two-way consent" referring to the prior to consent clear and conspicuous disclosure going one way, and the "reasonable demonstration" going the other way. 146 CONG. REC. S5165, 5216 (2000) (statement of Sen. Wyden). "'Reasonably demonstrates' means just that. It means the consumer can prove his or her ability to access the electronic information that will be provided. It means the consumer, in response to an electronic vendor enquiry, actually opens an attached document sent electronically by the vendor and confirms that ability in an e-mail response. It means there is a two-way street. It is not sufficient for the vendor to tell the consumer what type of computer or software he or she needs. It is not sufficient for the consumer merely to tell the vendor in an e-mail that he or she can access the information in the specified formats. There must be meaningful two-way communication electronically between the vendor and consumer." "[I]t must be possible to `reasonably demonstrate' that a consumer will be able to access the various forms of electronic records that the consumer has consented to receive. This is a requirement that has no parallel in the paper world. To ensure that consumers can get the full benefits of these electronic records provisions, consumers should only need to consent once either on paper or electronically, with the ability to withdraw their consent if changes create a problem for them. There is concern that S. 761 may actually create a new basis for denying legal effect to electronic records if they are not in a form that could be retained and accurately reproduced for later reference by any parties who are entitled to retain them. It is my hope, Mr. Speaker, that Congress will be able to respond effectively to these and other challenges that would be brought on by the rapidly changing nature of the Internet economy." 146 CONG. REC. H4341, 4349 (2000) (statement of Rep. Dreier).

of paper consents to electronic delivery by creating new requirements which in any event are not consistent with those in the paper world.[65] It is not enough for the consumer to consent. The consent itself must demonstrate the fact of consent. What happens if a contractual relationship is initiated in person or by mail? Must the consumer then return home and consent by using his or her PC? What if the consumer has more than one PC, for example at home and at the office? Is the consumer limited to receipt of electronic records at only one PC?

If a company is required to provide information to a consumer and chooses to do so in one particular form (*e.g.*, monthly emails) but also decides to make it available at the consumer's option in another electronic form (*e.g.*, access to web site), does the consumer have to consent to the provision of the information in both electronic forms? If the records are going to be provided in a variety of formats, it may well be impossible for a single consent to demonstrate the consumer's ability to access all of them. Are providers and consumers therefore required either to consent over and over again or go through an onerous, multi-part consent? In a related vein, if a company offers a menu of access options for a consumer to access information, must the consumer consent to each manner in which the information may be made available electronically by the company or just the way or ways the consumer plans to access it?

[65] The verification requirements inherent in this provision are analogous to requiring that the first letter mailed to a consumer must meet the standards of certified mail, thereby setting up a more exigent standard for e-commerce than the paper world.

Finally, there also is a potential concern that the vagueness of the "reasonably demonstrates" standard could provide opportunities for disgruntled consumers and plaintiffs' attorneys to renege on consents once given.

As a general matter, Senate Democrats argued that it is essential that a consumer consent electronically to the provision of electronic records so that the provider can verify that the consumer will in fact be able to access the information in the electronic form in which it will be sent.[66] They believed that this electronic consent mechanism would provide an additional assurance that a technologically unsophisticated consumer actually has an operating email address and other technical means for the opening of the disclosures. ("Most simply will not know whether they have the necessary hardware and software even if the technical specifications are provided; few consumers would understand: '433 MHz; 32 mg RAM; Windows 98, version 2'").[67] However, are the colloquies on the floor of Congress reliable on this point? In a colloquy on the Senate floor during debate on the Conference Committee report of the E-Sign Act,[68] it was stated that an email response from a consumer that confirmed that the consumer could access electronic records in the specified formats would satisfy the "reasonable demonstration" requirement. Other examples given in the colloquys as to what might satisfy this requirement included an affirmative response to an electronic query asking if the consumer could access the electronic information. As noted in Footnote 63, *supra*, Senators McCain and Abraham, in their colloquy, also stated that the requirement could

[66] *See* document released by Senate Democrats entitled "Comments on Conference Draft, May 17, 2000."
[67] *Id*.
[68] 146 CONG. REC. S5281, 5282 (2000) (colloquy between Chairman McCain and Sen. Abraham).

be satisfied if it was shown that the consumer actually accessed the electronic records in the relevant format, *i.e.*, "reasonably demonstrate" by usage.

*Fourth*, and finally, if the hardware or software requirements needed to access or retain electronic records change after the consumer has given affirmative consent and that change "creates a material risk that the consumer will not be able to access or retain a subsequent electronic record that was the subject of the consent," then the party providing the electronic record must provide the consumer with two statements. First, the provider must give a statement of the revised hardware and software requirements for access to and retention of the electronic records.[69] Second, the provider must also give a statement of the right to withdraw consent without the imposition of any fees for such withdrawal and without the imposition of any condition or consequence that was not disclosed under the "clear and conspicuous statement" prior to consent.[70] After these statements are provided to the consumer, the consumer must again "reasonably demonstrate" that he or she can access the information that will be used to provide the information that is the subject of the consent.[71] For the reasons outlined above as to the initial consent, critics opposed this re-consent as unnecessary and burdensome, out of concern that the accumulation of consumer consents and disclosures may confuse and intimidate consumers and discourage their use of e-commerce. There also remains the question of what is meant by the undefined term "material risk." How does one determine whether a change in hardware or software requirements will create a "material risk" that the

[69] S. 761, 106th Cong. §101(c)(1)(D)(i) (2000).
[70] S. 761, 106th Cong. §101(c)(1)(D)(i) (2000).
[71] S. 761, 106th Cong. §101(c)(1)(D)(ii) (2000).

consumer will not be able to access or retain information? If the company offers multiple means to access information, does a change in just one method trigger these requirements or does the availability of other methods (to which the consumer consented?) imply there is no "material risk" of inaccessibility? Must the change notice be given prospectively (before the change is made) and, if so, how can the consumer's consent "reasonably demonstrate" his or her ability to access the records through the new hardware and software? If the notice may be given after implementing the new hardware and software, how must the notice be given, especially if the consumer can no longer access the notice? Does this standard require re-notification and renewed consent every time there is simply a system upgrade?

*Other provisions in section 101(c).* Section 101(c)(2) preserves consumer protections by not allowing Title I to affect the "content or timing of any disclosure or other record required to be provided or made available to any consumer under any statute, regulation or other rule of law."[72] Further, it provides for electronic records to be

[72] S. 761, 106th Cong. §101(c)(2)(A) (2000). "State and federal law requirements on delivering documents have not been addressed in this Act. The underlying rules on these issues still prevail. It is our view that records provided electronically to consumers must be provided in a manner that has the same expectation for the consumer's actual receipt as was contemplated when the state law requirement for "provided" was passed. So, for example, if a statute requires that a disclosure be provided within 24 hours of a certain event and that the disclosure include specific language set forth clearly and conspicuously. That requirement could be met by an electronic disclosure if provided within 24 hours of that event, which disclosure included the specific language, set forth clearly and conspicuously. However, simply providing a notice electronically does not obviate the need to satisfy the underlying statute's requirements for timing and content." 146 CONG. REC. S5165, 5230 (2000) (Hollings, Wyden and Sarbanes Statement). Senator Leahy voiced a concern that the conference report "fails to provide a clear Federal rule—or, indeed, any rule at all—concerning how it is intended to affect requirements that information be sent, provided, or otherwise delivered….The conference report touches upon the issue of delivery in section 101(c)(2)(B), but only with respect to specified methods that require verification or acknowledgement of receipt, such as registered or certified mail. What happens to State law requirements that a notice be sent by first-class mail or personal delivery? How about a law that requires information to be provided, sent, or delivered in writing, but does not specify a particular method of delivery? I raised these questions during the

used in a situation where a law enacted prior to the E-Sign Act requires a verification or acknowledgement of receipt, provided the electronic method used gives verification or acknowledgement of receipt.[73]

Section 101(c)(2) thus preserves existing non-electronic consumer protections by not allowing Title I to affect the content or timing of any disclosure or other record legally required to be provided or made available to any consumer. However, it is a concern that the E-Sign Act does not provide a clear federal rule concerning how the Act is intended to affect legal requirements that information be sent, provided, or otherwise delivered? Section 101(c)(2)(B) touches on the delivery issue, but only with respect to specified methods that require verification or acknowledgement of receipt, such as registered or certified mail. If a pre-E-Sign Act state law requires that a consumer notice be sent by first-class mail or personal delivery, without a verification or acknowledgement of receipt, does the E-Sign Act preempt that requirement? If the state law writing requirement is preempted by section 101(a) of the E-Sign Act, but the delivery method is not, can that delivery requirement be satisfied by mailing a computer disk through the U.S. mail (assuming the consumer consented to receipt of the electronic record on a floppy disk under section 101(c)(1)(C))? The reporters' comment to section 8(b) of UETA indicates that is the intent of the comparable provision of UETA, but the

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conference, but the conference report provides few answers." 146 CONG. REC. S5165, 5222 (2000) (Sen. Leahy).

[73] S. 761, 106th Cong. §101(c)(2)(B) (2000).

specific wording of the section in UETA varies somewhat from that in section 101(c)(2)(B) of the E-Sign Act.[74]

Section 101(c)(3) offers a narrow savings clause: "The legal effectiveness, validity, or enforceability of any contract executed by a consumer shall not be denied solely because of the failure to obtain electronic consent or confirmation of consent by that consumer in accordance with paragraph (1)(C)(ii)."[75] This subsection implies that a

[74] Section 102(c) of the E-Sign Act suggests that Congress may have intended to preempt at least certain of these types of state delivery requirements. Section 102(c) provides that section 102(a) "does not permit a State to circumvent this title or title II through the imposition of nonelectronic delivery methods under section 8(b)(2)" of UETA.

[75] S. 761, 106th Cong. §101(c)(3) (2000). "Section 101(c)(3) is a narrow savings clause to preserve the integrity of electronic contracts: just because the consumer's consent to electronic notices and records was not obtained properly does not mean that the underlying contract itself is invalid. This provision only affects electronic records, it simply means that an electronic consent which fails to meet the requirements of section 101(c) does not create a new basis for invalidating the electronic contract itself." 146 CONG. REC. S5165, 5230 (2000) (Hollings, Wyden and Sarbanes Statement). "Section 101(c)(3) makes clear that an electronic contract or electronic signature cannot be deemed ineffective, invalid, or unenforceable merely because the party contracting with a consumer failed to meet the requirements of the consent to electronic records provision. Compliance with the consent provisions of section 101(c) is intended to address the effectiveness of the provision of information in electronic form, not the validity or enforceability of the underlying contractual relationship or agreement between the parties. In other words, a technical violation of the consent provisions cannot in and of itself invalidate an electronic contract or prevent it from being legally enforced. Rather, the validity and enforceability of the electronic contract is evaluated under existing substantive contract law, that is, by determining whether the violation of the consent provisions resulted in a consumer failing to receive information necessary to the enforcement of the contract or some provision thereof. For example, if it turns out that the manner in which a consumer consented did not `reasonably demonstrate' that she could access the electronic form of the information at a later date, but at the time of executing the contract she was able to view its terms and conditions before signing, the contract could still be valid and enforceable despite the technical violation of the electronic consent provision." 146 CONG. REC. S5281, 5284 (2000) (Abraham Explanatory Statement). "Let me make special note of section 101(c)(3), a late addition to the conference report. Without this provision, industry representatives were concerned that consumers would be able to back out of otherwise enforceable contracts by refusing to consent, or to confirm their consent, to the provision of information in an electronic form. At the same time, however, companies wanted to preserve their autonomy as contracting parties to condition their own performance on the consumer's consent. For example companies anticipated that they might offer special deals for consumers who agreed not to exercise their right to paper notices. Section 101(c)(3) makes clear that failure to satisfy the consent requirements of section 101(c)(1) does not automatically vitiate the underlying contract. Rather, the continued validity of the contract would turn on the terms of the contract itself, and the intent of the contracting parties, as determined under applicable principles of State contract law. Failure to obtain electronic consent or confirmation of consent would, however, prevent a company from relying on section 101(a) to validate an electronic record that was required to be provided or made available to the consumer in writing." 146 CONG. REC. S5165, 5220 (2000) (statement of Sen. Leahy).

failure to meet the requirements of section (c) other than (c)(1)(C)(ii) could be grounds for denying the legal effectiveness, validity or enforceability of a consumer contract. For example, if the person providing the record failed to include in the clear and conspicuous statement, required by section 101(c)(1)(B), the procedures necessary for the consumer to update the information needed to contact the consumer electronically, would that mean that the consumer's affirmative consent was not valid? Would it therefore mean that the person providing the records did not have the right to deliver the records electronically and, as a result, was not meeting its legal requirement to provide the information to the consumer in writing, even though the consumer was in fact receiving and able to access and retain the electronic records required to be provided? If the contract is enforceable, but the company provides notices required by law and the contract in electronic form without obtaining proper consumer consent, is it in breach of the contract? (the savings clause covers only contracts; the electronic record itself would clearly be invalidated by failure to meet the electronic consent requirements).

Section 101(c)(4) deals with the prospective effect of withdrawal of a consumer's consent. If a consumer withdraws consent, the legal effectiveness, validity, or enforceability of electronic records provided or made available prior to implementation of the consumer's withdrawal of consent is not affected.[76] Moreover, a consumer's consent becomes effective within a "reasonable period of time" after the provider receives the withdrawal.[77] Further, if a change of hardware or software requirements needed to access or retain electronic records results in a material risk and the provider

[76] S. 761, 106th Cong. §101(c)(4) (2000).

fails to comply with section 101(1)(D), such a failure may, "at the election of the consumer, be treated as a withdrawal of consent for purposes of section 101(c)(4)."[78] Although this provision is noncontroversial, it is unclear what constitutes a "reasonable period of time" after which a consumer's withdrawal of consent would be considered effective. Would it be as soon as a company is able to process the change and start sending the paper records?

Section 101(c)(5) clarifies that section 101 does not apply to "any records that are provided or made available to a consumer who has consented prior to the effective date of [Title I] to receive such records in electronic form as permitted by statute, regulation or other rule of law."[79]

Finally, section 101(c)(6) provides that neither an oral communication nor a recording of an oral communication shall qualify as an electronic record except as otherwise provided under applicable law.[80] This subsection was inserted by the conferees

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[77] *Id.*
[78] *Id.*
[79] S. 761, 106th Cong. §101(c)(5) (2000).
[80] S. 761, 106th Cong. §101(c)(6) (2000). The floor statements on this provision are contradictory. "It should be noted that Section 101(c)(6) does not preclude the consumer from using her voice to sign or approve that record. Proper voice signatures can be very effective in confirming a person's informed intent to be legally obligated. Therefore, the consumer could conceivably use an oral or voice signature to sign a text record that was required to be given to her 'in writing'. Moreover, the person who originated the text record could authenticate it with a voice signature as well. The spoken words of the signature might be something like `I Jane Consumer hereby sign and agree to this loan document and notice of interest charges.' By way of clarification, the intent of this clause is to disqualify only oral communications that are not authorized under applicable law and are not created or stored in a digital format. This paragraph is not intended to create an impediment to voice-based technologies, which are certain to be an important component of the emerging mobile-commerce market. Today, a system that creates a digital file by means of the use of voice, as opposed to a keyboard, mouse or similar device, is capable of creating an electronic record, despite the fact that it began its existence as an oral communication." 146 CONG. REC. S5281, 5284 (2000) (Abraham Explanatory Statement). "I should also explain the significance of section 101(c)(6), which was added at the request of the Democratic conferees. This provision makes clear that a

late in the process to protect consumers by closing a perceived loophole that would allow an oral communication or record of an oral communication to substitute for written notices to consumers.

This section raises several separate issues. First, does this language mean that a company may not utilize voice-response technology to deliver through voice recordings information contained in electronic records that are required to be made available pursuant to some statute. Section 101(a) seemingly would permit an electronic record to consist of oral recordings, but section 101(c)(6) would prohibit an oral communication or recording of an oral communication to qualify as an electronic record "except as otherwise provided under applicable law" and thus to substitute for written notices to consumers under subsection 101(c). One implication of section 101(c)(6) is to permit oral recordings in commercial, non-consumer contexts.

Second, where applicable law would permit oral delivery of a record, would section 101(c)(6) permit the use of an oral recording to "reasonably demonstrate" the consumer's consent to receipt of oral recordings for purposes of section 101(c)(1)(B)(iv)?

Finally, can a consumer's voice recording be used to confirm a customer's acceptance of an electronic contract or other record? For example, to the extent that a

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telephone conversation cannot be substituted for a written notice to a consumer. For decades, consumer laws have required that notices be in writing, because that form is one that the consumer can preserve, to which the consumer can refer, and which is capable of demonstrating after the fact what information was provided. Under appropriate conditions, electronic communications can mimic those characteristics; but oral notice over the telephone will never be sufficient to protect consumer interests." 146 CONG. REC. S5165, 5220 (2000) (statement of Sen. Leahy).

consumer has orally "signed" a contract (which is clearly permissible under section 101(a)), and a statute requires delivery of a written copy or other record of that contract, can the company deliver to the consumer an electronic record that makes notation of the fact that the contract was orally signed or, alternatively, include a copy of the voice recording?

*Section 101(d): retention of contracts and records*. Section 101(d) provides the protocol for the retention of electronic contracts and electronic records that are required to be retained pursuant to applicable law (it does not apply if they are not legally required to be retained). This section is intended to ensure that information stored electronically will remain effective for audit, evidentiary, archival and similar purposes.[81]

Under section 101(d)(1), when a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be retained, an electronic record can satisfy the requirement if two criteria are met.[82] First, information in the contract or other record must "accurately reflect the information set forth."[83] Second, the electronic record must remain "accessible to all persons who are entitled to access by statute, regulation, or rule of law, for the period

[81] S. 761, 106th Cong. §101(d) (2000).
[82] S. 761, 106th Cong. §101(d)(1) (2000). "There is concern that S. 761 may actually create a new basis for denying legal effect to electronic records if they are not in a form that could be retained and accurately reproduced for later reference by any parties who are entitled to retain them. It is my hope, Mr. Speaker, that Congress will be able to respond effectively to these and other challenges that would be brought on by the rapidly changing nature of the Internet economy." 146 CONG. REC. H4341, 4359 (2000) (statement of Rep. Dreier). "Section 101(d) recognizes the importance of accuracy and accessibility in electronic records, which is of utmost importance for investor protection and prevention of fraud." 146 CONG. REC. H4341, 4350 (2000) (statement of Rep. Markey).
[83] S. 761, 106th Cong. §101(d)(1)(A) (2000).

required…in a form that is capable of being accurately reproduced for later reference, whether by transmission, printing, or otherwise."[84]

The vagueness of the term "accurately reproduced" potentially raises questions. Does it mean that the provider has to be able to reproduce only the substantive portion of a document or verbatim reproduction, providing non-substantive formatting information? The floor statements provide little effective guidance.

With respect to the requirement that the information remain accessible, Senator Abraham stated that section 101(d)(1)(B) "only requires retained records to remain accessible to persons entitled to access them by statute. [It] does not require the business to provide direct access to its facilities nor does it require the business to update electronic formats as technology changes--the records must, however, be capable of being accurately reproduced at the time that reference to them is required by law."[85] This statement appears to be in contrast to the official comments to a similar provision of UETA which state that, "The requirement of continuing accessibility addresses the issue of technological obsolescence and the need to update and migrate information to developing systems." Thus while the provisions of section 101(d)(1) clearly appear to permit information originally stored in one form, such as the hard drive of a computer, to be transferred to another form such as CD-ROM or converted to an updated file format to preserve accessibility, it is not clear if such conversion or updating will be deemed to be required by the terms of this section.

[84] S. 761, 106th Cong. §101(d)(1)(B) (2000).

This section also permits parties to convert original written records to electronic records for retention, provided the requirements of section 101(d)(1) are satisfied. Accordingly, in the absence of specific requirements to retain written records, written records may be destroyed once saved as electronic records satisfying the requirements of this section.

The section significantly refers to the information contained in the contract or record, rather than referring to the contract or record itself, thereby clarifying that the critical aspect in retention is the information itself. What information must be retained is determined by the purpose for which the information is needed. If the addressing and pathway information regarding an email is relevant, then that information should also be retained. However if it is the substance of the email that is relevant, only that information need be retained. Of course, wise record retention would include all such information since what information will be relevant at a later time will not be known.

Section 101(d)(2) affords a limited exception. "A requirement to retain a contract or other record in accordance with [101(d)(1)] does not apply to any information whose sole purpose is to enable the contract or other record to be sent, communicated, or received,"[86] such as IP packet header information.

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[85] 146 CONG. REC. S5281, 5284 (2000) (Abraham Explanatory Statement).
[86] S. 761, 106th Cong. §101(d)(2) (2000).

Additionally, if an original record is required, an electronic record that complies with section 101(d)(1) will suffice.[87] Similarly, if the retention of a check is required, an electronic record of the information on the front and back of the check will satisfy the requirement if in accordance with section 101(d)(1).[88] This provision specifically addresses particular concerns regarding check retention statutes in many jurisdictions. A report compiled by the Federal Reserve Bank of Boston identifies hundreds of state laws which require the retention or production of original canceled checks. Such requirements preclude banks and their customers from realizing the benefits and efficiencies related to truncation processes otherwise validated under current law. This section provides that, as long as the information on both the front and the back of the check is retained in an electronic record that meets the other requirements of section 101(d), the paper original of the check no longer needs to be retained.

*Section 101(e): accuracy and ability to retain contracts and other records*.

Section 101(e) requires, despite section 101(a), that if a statute, regulation or other rule of law requires that a contract or other record be in writing, the legal effect, validity, or enforceability of an electronic record of such contract or other record "may be denied if such electronic record is not in a form that is capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record."[89] Other than self-destructing tapes (the so-called "Mission

[87] S. 761, 106th Cong. §101(d)(3) (2000).
[88] S. 761, 106th Cong. §101(d)(4) (2000).
[89] S. 761, 106th Cong. §101(e) (2000). "The Conferees added new language in section (e) of 101 to establish that a contract or record which is required under other law to be in writing loses its legal validity unless it is provided electronically to each party in a manner which allows each party to retain and use it at a later time to prove the terms of the record." 146 CONG. REC. S5165, 5230 (2000) (Hollings, Wyden and

Impossible" exception?), what electronic forms should a company avoid using because they are not in "a form that is capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record"? This issue is important because if an electronic contract, record or signature does not meet the section 101(e) requirements, section 101(a) will not apply to situations where law requires the contract or other record to be in written form (*e.g.*, Statute of Frauds). To what extent does section 101(e) require that the form of the record be updated as technology develops?

In addition to the vagueness of the "accurately reproduced" standard, Section 101(e) possibly might be viewed as confusing the evidentiary requirements for authenticating a contract or record with the legal validity of the agreement itself or the enforceability of the obligations contained in the parties' agreement. In this view, this

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Sarbanes Statement). "Section 101(e) addresses statutory and regulatory requirements that certain records, including contracts, be in writing. The statute of frauds writing requirement exemplifies one such legal requirement…This provision is intended to reach two qualities of 'a writing' in the non-electronic world. The first such quality of 'a writing' is that it can be retained, e.g., a contract can be filed. The second such quality of 'a writing' is that it can be reproduced, e.g., a contract can be copied. With respect to Section 101(e), the actual inability of a party to reproduce a record at a particular point in time does not invoke this subsection. The subsection merely requires that if a statute requires a contract to be in writing, then the contract should be capable of being retained and accurately reproduced for later reference by those entitled to retain it. Thus if a customer enters into an electronic contract which was capable of being retained or reproduced, but the customer chooses to use a device such as a Palm Pilot or cellular phone that does not have a printer or a disk drive allowing the customer to make a copy of the contract at that particular time, this section is not invoked. The record was in a form that was capable of being retained and reproduced by the customer had it chosen to use a device allowing retention and reproduction." 146 CONG. REC. S5281, 5284 (2000) (Abraham Explanatory Statement). "Under section 101(e) of the conference report, the legal effect of an electronic contract or record may be denied if it is not in a form that can be retained and accurately reproduced for later reference and settlement of disputes. This means that the parties to a contract may not satisfy a statute of frauds requirement that the contract be in writing simply by flashing an electronic version of the contract on a computer screen. Similarly, product warranties must be provided to purchasers in a form that they can retain and use to enforce their rights in the event that the product fails." 146 CONG. REC. S5165, 5220 (2000) (statement of Sen. Leahy).

section implies that an entire contract might be invalidated if an electronic record relating to the contract is not retained in a way that meets the "accurately reproduced" standard.

*Section 101(f): proximity of warnings, notices, etc.* Section 101(f) states that nothing in Title I affects the proximity required by any statute, regulation, or rule of law with respect to any warning, disclosure, or other record required to be posted, displayed or publicly fixed.[90] However, it is unclear how a company that is using electronic records should meet proximity requirements for warnings, notices, disclosures, etc. that were developed for the paper world. There possibly could be physical difficulties in translating these requirements onto a screen.

*Section 101(g): treatment of notarization and acknowledgement*. Section 101(g) states that a notarization, acknowledgement, verification or other oath may be satisfied by an electronic signature if "the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable statute, regulation, or rule of law, is attached to or logically associated with the signature or record."[91] Given the absence of attribution or association provisions in the E-Sign Act (which are present at section 9 of UETA), there is a question as to what rules of attribution or association apply if the E-Sign Act, rather than UETA, is operative under

[90] S. 761, 106th Cong. §101(f) (2000).
[91] S. 761, 106th Cong. §101(g) (2000). "This subsection permits notaries public and other authorized officers to perform their functions electronically, provided that all other requirements of applicable law are satisfied. This subsection removes any requirement of a stamp, seal, or similar embossing device as it may apply to the performance of these functions by electronic means. It is my intent that no requirement for the use of a stamp, seal, or similar device shall preclude the use of an electronic signature for these purposes." 146 CONG. REC. S5281, 5285 (2000) (Abraham Explanatory Statement).

the E-Sign Act's preemption provisions. The use of the term "logically associated with" provides little guidance as to what a party can legally accept.

*Section 101(h): treatment of electronic agents*. Section 101(h) addresses electronic agents. Provided the action of an electronic agent is legally attributable to the person to be bound, a contract or other record may not be denied legal effect, validity or enforceability solely because its formation, creation, or delivery involved the action of one or more electronic agents.[92]

This section confirms that contracts can be formed by machines functioning as electronic agents for parties to a transaction. It negates any claim that lack of human intent, at the time of contract formation, prevents contract formation. When machines are involved, the requisite intention flows from the programming and use of the machine. This provision is consistent with the fundamental purpose of the Act to remove barriers to electronic transactions while leaving the substantive law, such as law of mistake or law of contract formation, unaffected to the greatest extent possible. However, a question arises as to what standards should apply to determine whether the action of an electronic agent is "legally attributable." Unlike section 9 of UETA, the E-Sign Act contains no formal attribution rules.

[92] S. 761, 106th Cong. §101(h) (2000).

*Sections 101(i) and 101(j): treatment of insurance industry, agents, and brokers*.

The McCarran-Ferguson Act[93] provides that regulation of the insurance industry is normally the sole province of the states. Congress does have the *power* to regulate the insurance industry, however, and federal law trumps state insurance law if Congress clearly states that its intent is to do so. Section 101(j) of the Act plainly states that Titles I and II of the E-Sign Act apply to the business of insurance,[94] thereby prohibiting states from refusing to enforce an insurance contract solely because it used an electronic signature or electronic record in its formation.

Section 101(j) expands on this basic premise by exculpating insurance agents and brokers who act under the direction of a party to enter into a contract by means of electronic record or electronic signature "for any deficiency in the electronic procedures agreed to by the parties under that contract" but only if (i) the agent or broker has not engaged in negligent, reckless, or intentional tortious conduct; (ii) was not involved in the development or establishment of such electronic procedures; and (iii) did not deviate from such procedures.[95]

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[93] 15 U.S.C. § 1011 et seq.

[94] S. 761, 106th Cong. §101(i) (2000).

[95] S. 761, 106th Cong. §101(j) (2000). However, the Senate Democrats were not happy with this provision. "Another troubling provision in the conference report appears at the end of section 101, and concerns the liability of insurance agents and insurance brokers. This provision appeared for the first time in a conference draft produced by the Republican conferees on May 15th. In its original incarnation, this provision gave insurance agents and brokers absolute immunity from liability if something went wrong as a result of the use of electronic procedures. This was not just a shield from vicarious liability, or even from negligence; rather, it was an absolute shield, which would protect insurance agents and brokers from their own reckless or even wilful conduct. No matter that insurance agents and brokers are perfectly capable of protecting themselves through their contracts with insurance companies and their customers. Senator Hollings and I opposed the provision as unnecessary and indefensible as a matter of policy, and we succeeded in transforming it into a clarification that insurance agents and brokers cannot be held vicariously liable for deficiencies in electronic procedures over which they had no control. In this form, the

Section 102. Preemption

Section 102 is a significant provision which preempts state laws, while trying to take into account the interests of the states.[96] This section raises some of the most complex issues in the E-Sign Act for a party which is trying to determine whether it can or should take advantage of the E-Sign Act or UETA.

*Section 102(a): general rule of preemption*. Section 102(a) provides that a state statute, regulation or other rule of law may modify, limit or supersede the provisions of section 101 with respect to State law only if such statute, regulation or other rule of law satisfies the criteria laid out in either sections 102(a)(1) or 102(a)(2).

Under the first option, section 102(a)(1), the State statute, regulation, or other rule of law must constitute:

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provision remains in the bill as a stark reminder of the power of special interests." 146 CONG. REC. S5165, 5222 (2000) (statement of Sen. Leahy).

[96] "Section 102 of the conference report provides a conditioned process for States to enact their own statutes, regulations or other rules of law dealing with the use and acceptance of electronic signatures and records and thus opt-out of the federal regime. The preemptive effects of this Act apply to both existing and future statutes, regulations, or other rules of law enacted or adopted by a State. Thus, a State could not argue that section 101 does not preempt its statutes, regulations, or other rules of law because they were enacted or adopted prior to the enactment of this Act." 146 CONG. REC. S5281, 5285 (2000) (Abraham Explanatory Statement). "I believe that the eventual adoption of UETA by all 50 states in a manner consistent with the version reported by NCCUSL will provide the same national uniformity which is established in the Federal legislation. For that reason, and at my insistence, when a state adopts the `Uniform Electronic Transactions Act' (UETA) as reported by NCCUSL, the federal preemption provided in this bill is superceded. In the meantime, the preemption contained in the Federal Act will ensure a uniform standard of legal certainty for both electronic signatures and electronic records." 146 CONG. REC. S5165, 5224 (2000) (statement of Sen. Abraham).

> …an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999, except that any exception to the scope of such Act enacted by a State under section 3(b)(4) of such Act shall be preempted to the extent such exception is inconsistent with this title or Title II, or would not be permitted under paragraph [102(a)(2)(A)(ii)]. [97]

This subsection closes the so-called "UETA section 3(b)(4) loophole" under which a state that enacts UETA may exempt from its enactment of UETA specific transactions governed by particular laws identified by the state when it enacts UETA.[98] This loophole had been a particular concern of advocates of a uniform nationwide standard because some states, most notably California, have enacted versions of UETA that contain numerous departures from the version of UETA approved by NCCUSL. Also, by expressly including the cross reference to section 102(a)(2)(A)(ii), the provision incorporates a technology neutrality provision, i.e., if a state enacts UETA with section 3(b)(4) exceptions those exceptions must not require, or accord greater legal status or

[97] S. 761, 106th Cong. §102(a)(1) (2000). "Subsection (a)(1) places a limitation on a State that attempts to avoid Federal preemption by enacting or adopting a clean UETA. Section 3(b)(4) of UETA, as reported and recommended for enactment by NCCUSL, allows a State to exclude the application of that State's enactment or adoption of UETA for any 'other laws, if any, identified by State.' This provision offers a potential loophole for a State to prevent the use or acceptance of electronic signatures or electronic records in that State. To remedy this problem, subsection (a)(1) requires that any exception utilized by a State under section 3(b)(4) of UETA shall be preempted if it is inconsistent with Title I or II, or would not be permitted under subsection (a)(2)(ii) (technology neutrality). Requirements for certified mail or return receipt would not be inconsistent with Title I or II, however, note that an electronic equivalent would be permitted." 146 CONG. REC. S5281, 5285 (2000) (Abraham Explanatory Statement). "States that enact UETA in the manner specified in (a)(1) may supercede the provisions of section 101 with respect to State law. Thus, regulatory agencies within a state which comply with (a)(1) would interpret UETA, not section 101 of the federal act. Further, some States are enacting or adopting a strict, unamended version of UETA as well as enacting or adopting a companion or separate law that contains further provisions relating to the use or acceptance of electronic signatures or electronic records. Under this Act, such action by the State would prompt both subsection (a)(1) (for the strict enactment or adoption of UETA) and subsection (a)(2) (for the other companion or separate legislation)." *Id.*

[98] Section 3(b)(4) of UETA states: "This [Act] does not apply to a transaction to the extent that it is governed by:…[other laws, if any, identified by State]."

effect to, a specific technology or technical specifications for electronic records or signatures.

However, there is a question as to whether all laws excepted by a state under section 3(b)(4) would be preempted because, as a practical matter, they are bound to be "inconsistent with" Titles I and II of the E-Sign Act, if only because, for example, they do not affirmatively contain the detailed consumer consent provisions found in Title I. The answer to this question hinges on what section 102(a)(1) means by "inconsistent with." If that term is construed broadly as suggested above, the section 3(b)(4) exception option will prove illusory. However, under section 102(a)(1) preemption exists only "to the extent that" such exception is inconsistent with Titles I and II of the E-Sign Act. Thus, the remainder of a state enactment of UETA (other than the section 3(b)(4) exceptions) presumably would not be preempted.

A separate issue arises in examining the placement of the comma in subsection (a)(1) ("…this title or title II, or would not be permitted under paragraph 2(A)(ii) of this subsection"). The comma possibly suggests that the state law is not preempted by the E-Sign Act if it either is (i) an enactment of NCCUSL-approved UETA (except that any section 3(b)(4) exception thereto must be consistent with Titles I and II of the E-Sign Act) or (ii) if it is not an enactment of NCCUSL-approved UETA, it is technology neutral. There arguably is some sense to this interpretation, as it would allow flexibility for non-substantive changes to the version of UETA approved by NCCUSL, provided these changes do not "specify alternative procedures or requirements for the use or

acceptance" of electronic records or signatures, in which case subsection (a)(2) would come into play. However, this reading of subsection (a)(1) is based on a close, technical reading of the text of that subsection and places much reliance on a single comma. There also is the question of whether this reading, which would result in a major loophole to the preemption provisions, is what Congress intended. There is no relevant legislative history which dispositively answers this question.[99]

Alternatively, the comma cited above could be read as an error in drafting so that the phrase "or would not be permitted under paragraph (2)(A)(ii)" is meant only to refer to and modify the state's enactment of NCCUSL-approved UETA as provided for in subsection (a)(1). The effect would be to disallow variations from the NCCUSL-approved version of UETA other than those contemplated by section 3(b)(4) and which are consistent with Titles I and II and are technology neutral.

Under the second preemption alternative, section 102(a)(2), the state law must specify the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records if three conditions are satisfied.[100] First, the alternative procedures or requirements must be consistent with Titles I and II of the E-Sign Act.[101] Second, the alternative procedures or requirements must "not require, or

[99] However, *see* Statement of Chairman Bliley that: "Any variation or deviation from the exact UETA document reported and recommended for enactment by NCCUSL shall not qualify under subsection (a)(1). Instead, such efforts and any other effort may or may not be eligible under subsection (a)(2)." 146 CONG. REC. H4353 (2000).
[100] S. 761, 106th Cong. §102(a)(2)(A) (2000).
[101] S. 761, 106th Cong. §102(a)(2)(A)(i) (2000).

accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures."[102] Finally, if the state law is enacted or adopted after the date of the enactment of the E-Sign Act, it must make specific reference to the E-Sign Act.[103]

The net effect of these rules is to require an analysis that examines whether and to what extent the E-Sign Act preempts state law on a state-by-state basis. Thus, a party must examine whether the state adopted a clean version of UETA with no section 3(b)(4) exceptions, whether it adopted a clean version of UETA with section 3(b)(4) exceptions (and if so, whether those exceptions are consistent or inconsistent with Titles I and II of the E-Sign Act) or whether it adopted an unclean version of UETA (either with or without section 3(b)(4) exceptions that are either consistent or inconsistent with the E-Sign Act). Other variants that might have to be examined would be whether the state enacted a clean or unclean version of UETA plus the consumer consent provisions of the E-Sign Act or whether it adopted an unclean version of the E-Sign Act with consumer

[102] S. 761, 106th Cong. §102(a)(2)(A)(ii) (2000). "It is not intended that the singular use of technology or technological specification in subsection (a)(2)(A)(ii) allows a State to set more than one technology at the expense of other technologies in order to meet this standard, unless only one form of the technology exists, in which case this act is not intended to preclude a technological solution. Further, inclusion of the `or accord greater legal status or effect to' is intended to prevent a state from giving a leg-up or impose an additional burden on one technology or technical specification that is not applicable to all others, and is not intended to prevent a state or its subdivisions from developing, establishing, using or certifying a certificate authority system. In addition, subsection (a)(2)(B) requires that a State that utilizes subsection (a)(2) to escape federal preemption must make a specific reference to this Act in any statute, regulation, or other rule of law enacted or adopted after the date of enactment of this Act. This provision is intended, in part, to make it easier to track action by the various States under this subsection for purposes of research." 146 CONG. REC. S5281, 5285 (2000) (Abraham Explanatory Statement).

[103] S. 761, 106th Cong. §102(a)(2)(B) (2000).

provisions that are different from but similar to those of the E-Sign Act.[104] Differing results as to preemption could occur, assuming the party could predict with certainty what is meant by the term "consistent."[105]

Several of the more obvious permutations under the first alternative of section 102(a)(1) are as follows:

A. *State Adopts a "Clean" Version of UETA*. In this example, if a state simply adopts the official version of UETA, UETA would supersede section 101 of the E-Sign Act with respect to state law.

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[104] Senate Democrats took a particularly expansive view of the scope of the preemption provisions as to consumer consent: "Of course, the rules for consumer consent and accuracy and retainability of electronic records under this Act shall apply in all states that pass the Uniform Electronic Transaction Acts or another law on electronic records and signatures in the future, unless the state affirmatively and expressly displaces the requirements of federal law on these points. A state which passed UETA before the passage of this Act could not have intended to displace these federal law requirements. These states would have to pass another law to supercede or displace the requirements of section 101. In a state which enacts UETA after passage of this Act, without expressly limiting the consent, integrity and retainability subsections of 101, those requirements of this Act would remain in effect. The general provisions of UETA, such as the requirement for agreement to receive electronic records in UETA are not inconsistent with and do not displace the more specific requirements of section 101, such as the requirement for a consumer's consent and disclosure in section 101(c) [emphasis added]." 146 CONG. REC. S5165, 5230 (2000) (Hollings, Wyden and Sarbanes Statement). This interpretation appears to be at odds with the plain language of the statute.

For a thorough comparison of the E-Sign Act and UETA, as well as analysis of their mutual impact on one another, *see* Robert A. Wittie and Jane K. Winn, "E-Sign of the Times," [published in the August 2000 issue of *E-Commerce Law Report* and available at www.kd.com/Practice Areas/Technology/pubs/page 20.stm]. *Also see* Patricia Brumfield Fry, *A Preliminary Analysis of Federal and State Electronic Commerce Laws* (July 21, 2000) <http://www.nccusl.org/whatsnew-article1.htm>.

[105] An additional array of uncertainty surrounds the question of whether the E-Sign Act preempts conflicting state law in whole or in part. Presumably, if a state were to enact a clean version of UETA but for mere formatting changes there should be no preemption by the E-Sign Act. If, however, the state enactment of UETA contains changes that are inconsistent with the E-Sign Act, does the E-Sign Act preempt that state enactment to the extent that it is inconsistent with the E-Sign Act as provided in the section 3(b)(4) provision at subsection (a)(1) or does it preempt the entire state statute as arguably might be the case under subsection (a)(2) because of that subsection's omission of the phrase "to the extent?" Thus, does it matter if the changes are section 3(b)(4) changes or other changes or additions? Arguments can be made either way based on the legislative history. *See* Wittie and Winn, *supra*, and Fry, *supra*.

B. *State Adopts a "Clean" Version of UETA But Also Exercises Its Authority Under UETA Section 3(b)(4).* In this example, if a state adopts the official version of UETA, but also exercises its authority under section 3(b)(4) of UETA to make exceptions to the application of UETA to certain state laws, UETA would supersede section 101 with respect to state law. However, the additional section 3(b)(4) exceptions would be preempted to the extent they are inconsistent with the E-Sign Act or mandate a specific technology. One of four outcomes is possible:

1. *The Excluded State Laws Match Those in the E-Sign Act.* For example, the state might exclude from UETA matters relating to adoption, divorce and other matters of family law. That exception is consistent with the E-Sign Act and is not preempted.
2. *The Excluded State Laws Go Beyond Those in the E-Sign Act.* For example, the state might exclude certain health care records requirements from UETA. That exception is "inconsistent with" the E-Sign Act and is preempted.
3. *The Excluded State Laws Do Not Contain Elements in the E-Sign Act*. For example, the state law might not contain the E-Sign Act's consumer consent provisions. That exception arguably is "inconsistent with" the E-Sign Act and arguably would be preempted.
4. *The Excluded State Laws Might Mandate a Particular Technology*. For example, the state might exclude certain documents unless digital signatures are used for record retention and access matters. The state's

UETA exceptions would not be permitted under the technology neutrality section 102(a)(2)(ii) and would be preempted.

On the other hand, if a state were to enact a law other than the official version of UETA (either a non-UETA statute or a version of UETA that contains non-conforming provisions or exceptions), the following examples illustrate how section 102(a)(2) might apply:

A. *State Adopts an "Unclean" Version of UETA*. In this example, the entire statute would be reviewed for consistency with the E-Sign Act. If any of the provisions (whether conforming or not to the official version of UETA) are inconsistent with the E-Sign Act or violate the technology neutrality requirements of the E-Sign Act, the entire statute should be preempted.

B. *State Adopts an "Unclean" Version of UETA, But Also Exercises Its Authority Under UETA Section 3(b)(4).* The same analysis described in the example (A) immediately above should apply. Both the UETA statute and the exceptions to the application of UETA to certain state laws made pursuant to section 3(b)(4) of UETA would be reviewed for consistency with the E-Sign Act. Thus, if any of the provisions are inconsistent with the E-Sign Act or violate the technology neutrality requirements of the E-Sign Act, the entire UETA statute and the exceptions should be preempted.

Under section 102(a)(2), this result would be the case even if the non-conformity with the official version of UETA were limited to a UETA change that is "consistent"

with the E-Sign Act (*e.g.*, deleting "governmental" from the definition of "transaction") and to the exercise of authority under section 3(b)(4) of UETA to exclude state laws beyond the categories provided in the E-Sign Act. Under this scenario, the entire statute would be preempted. However, this approach produces what might appear as an odd result compared to section 102(a)(1). Because section 102(a)(2) does not include language corresponding to the section 102(a)(1) preemption of inconsistent UETA section 3(b)(4) state laws, inconsistent UETA section 3(b)(4) provisions will always fail the section 102(a)(2) consistency test, leading, arguably, to failure of the entire statute under section 102(a)(2).

One might take the position that "clean" provisions of a non-conforming version of UETA are *per se* "consistent" with the E-Sign Act, pointing to the existence of section 102(a)(1), and that the only inquiry into "consistency" required by section 102(a)(2) is with respect to the expressly nonconforming provisions. Advocates of this view would point to statements by Chairman Bliley to the effect that "a State that enacted a modified version of UETA would not be preempted *to the extent* that the enactment or adoption … met the conditions imposed in subsection (a)(2)."[106]

Critics of the Bliley statement might point to the plain language of section 102(a)(2), which is not modified by the language "to the extent that," and argue that Congress, having used the "to the extent" phrase in section 102(a)(1), expressly intended a "strict" preemption analysis by deliberately omitting the phrase from section 102(a)(2).

[106] 146 CONG. REC. H4353 (statement of Chairman Bliley) (emphasis added).

Supporters of Chairman Bliley's statement might counter that UETA is not a single statute, but consists of several statutes, each of which should be separately assessed for conformity under section 102(a)(1). This counter argument in turn raises the question of what Congress meant by a "statute, regulation, or rule of law" in section 102(a). For example, would an individual section (or even a particular sentence) from UETA constitute a "statute, regulation, or rule of law?" Will courts resort to such granular analysis to avoid preemption of a state statute that is mostly consistent with the E-Sign Act, but inconsistent in a few respects, preempting those few provisions and upholding the others? Did Congress really intend an "all or nothing" analysis?

As a practical matter, parties examining these issues will likely have to make an educated guess as to whether the E-Sign Act preempts state law in any given case and take the business risk of future court rulings that either agree or disagree with that determination.

*Section 102(b): exceptions for actions by states as market participants*. Under the section 102(a)(2) alternative to the UETA option for states, the technology neutrality condition, section 102(a)(2)(A)(ii), need not be satisfied if a state statute, regulation or other rule of law pertains to a state acting as a "market participant,"[107] another undefined term.

[107] *See* S. 761, 106th Cong. §102(b) (2000). "Subsection [102](a)(2)(A)(ii) shall not apply to the statutes, regulations, or other rules of law governing procurement by any State, or any agency or instrumentality thereof." *Id*.

*Section 102(c): prevention of state circumvention*. Section 102(c) closes the so-called "section 8(b)(2) loophole" by not permitting states to circumvent Titles I or II of the E-Sign Act through "the imposition of nonelectronic delivery methods under section 8(b)(2)" of UETA.[108] Section 8(b)(2) of UETA states: "If a law other than this [Act] requires a record (i) to be posted or displayed in a certain manner, (ii) to be sent, communicated, or transmitted by a specified method, or (iii) to contain information that is formatted in a certain manner, the following rules apply:…(2) Except as otherwise provided in (d)(2), the record must be sent, communicated, or transmitted by the method specified in the other law." Closing of the section 8(b)(2) loophole was a priority of the financial services industry, which alerted to the problem while the bill was in conference committee. Their concern was that this loophole would allow states to impose nonelectronic delivery requirements.

Section 103. Specific Exceptions

*Section 103(a): exception of certain requirements from section 101*. These provisions were much debated during the legislative process, and the list of exclusions expanded and contracted numerous times. The list that emerged is a compromise.

[108] S. 761, 106th Cong. §102(c) (2000). "Section 8(b)(2) of UETA allows States to impose delivery requirements for electronic records. Section 102(c) has the limited purpose of ensuring that the state does not circumvent Titles I or II of this Act by imposing nonelectronic delivery methods. Thus, provided that the delivery methods required are electronic and do not require that notices and records be delivered in paper form, States retain their authority under Section 8(b)(2) of UETA to establish delivery requirements." 146 CONG. REC. S5165, 5230 (2000) (Hollings, Wyden and Sarbanes Statement). "Section 102(c) makes clear that subsection (a) cannot be used by a State to circumvent this title or Title II through the imposition of nonelectronic delivery methods under section 8(b)(2) of UETA. Any attempt by a State to use 8(b)(2) to violate the spirit of this Act should be treated as effort to circumvent and thus be void." 146 CONG. REC. S5281, 5285 (2000) (Abraham Explanatory Statement).

Section 103(a)[109] states that section 101 shall not apply to a contract or other record to the extent that it is governed by a statute, regulation, or other rule of law with respect to (i) the creation and execution of wills, codicils, or testamentary trusts;[110] (ii) adoption, divorce, or other matters of family law;[111] or (iii) the Uniform Commercial Code ("UCC"), as in effect in any state, other than sections 1-107[112] and 1-206[113] and Articles 2[114] and 2A of the UCC.[115] These exceptions are based on those in UETA.

*Section 103(b): Additional exceptions to section 101*. Additionally, section 103(b)[116] excludes the following from the provisions of section 101: (i) court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings;[117] (ii) any notice of the

[109] "We specifically intend that a state may not use its authority under section 102, to authorize solely electronic records of those notices listed in section 103." 146 CONG. REC. S5165, 5230 (2000) (Hollings, Wyden and Sarbanes Statement).
[110] S. 761, 106th Cong. §103(a)(1) (2000).
[111] S. 761, 106th Cong. §103(a)(2) (2000).
[112] U.C.C. § 1-107 (1992). "§1-107. Waiver or Renunciation of Claim or Right After Breach. Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party." *Id.*
[113] U.C.C. § 1-206 (1992). "Statute of Frauds for Kinds of Personal Property Not Otherwise Covered. (1) Except in the cases described in subsection (2) of this section a contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent. (2) Subsection (1) of this section does not apply to contracts for the sale of goods (Section 2-201) nor of securities (Section 8-319) nor to security agreement (Section 9-203)." *Id.*
[114] U.C.C. Article 2 (1992). Article 2 applies to transactions in goods. *Id.*
[115] S. 761, 106th Cong. §103(a)(3) (2000). Article 2A applies to any transaction, regardless of form, that creates a lease. U.C.C. Article 2A (1992).
[116] "To clarify further, with respect to Section 103(b), the statement that `the provisions of section 101 shall not apply to' the listed items means only that Section 101 may not be relied upon to allow an electronic record or electronic signature to suffice. Section 103(b) does not prohibit use of electronic records or signatures, however. Whether such can be used is left to other law." 146 CONG. REC. S5281, 5286 (2000) (Abraham Explanatory Statement).
[117] S. 761, 106th Cong. §103(b)(1) (2000).

cancellation of utility services (including water, heat, and power);[118] (iii) any notice of default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual;[119] (iv) any notice of the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities);[120] (iv) any notice of recall of a product, or material failure of a product, that risks endangering health or safety;[121] and (vi) any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.[122]

Most of these exclusions were inserted by the conferees to answer concerns that consumers might not receive the notice or document in question because they had changed their e-mail address or installed different software since they gave their consent. In effect, these types of notices and documents were considered too important to rely solely on electronic records.

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[118] S. 761, 106th Cong. §103(b)(2)(A) (2000). "The exclusion pertaining to utility services applies to essential consumer services including water, heat and power. This provision does not apply to notices for other broadly used important consumer services, such as telephone, cable television, and Internet access services, etc. Electronic cancellation or termination notices may be used in association with those other services, assuming all of the other elements of Section 101 are met." 146 CONG. REC. S5281, 5286 (2000) (Abraham Explanatory Statement).

[119] S. 761, 106th Cong. §103(b)(2)(B) (2000).

[120] S. 761, 106th Cong. §103(b)(2)(C) (2000). However, a number of questions arise. What is a "notice of cancellation or termination?" Does it include notices preceding cancellation or termination such as renewal notices that warn of imminent cancellation if premiums are not paid by a specified date? What are "health insurance or benefits" and "life insurance benefits?" Do they include only traditional health (i.e., medical) insurance, or do they include income replacement policies benefits under which may be triggered by health problems, such as disability insurance and certain forms of long-term care insurance? What impact do state law definitions of those terms have? Are worker's compensation benefits to be regarded as "health insurance or benefits" notwithstanding state law classification of such insurance as a form of casualty insurance?

[121] S. 761, 106th Cong. §103(b)(2)(D) (2000).

[122] S. 761, 106th Cong. §103(b)(3) (2000).

Unlike section 13 of UETA, the E-Sign Act does not specifically provide that electronic contracts, records and signatures may not be excluded from evidence solely because of their electronic form. One might reasonably infer that if electronic contracts, records and signatures subject to the E-Sign Act could be denied admissibility in court it would defeat Congress' intent in enacting section 101(a).

*Section 103(c): required future review of exceptions to section 101*. Section 103(c)(1) directs the Secretary of Commerce, acting through the Assistant Secretary for Communications and Information, to review the operation of the exceptions to section 101 over a period of three years to evaluate whether the exceptions continue to be necessary for the protection of consumers.[123] Within three years after the enactment of the E-Sign Act the Assistant Secretary must submit a report to Congress on the results of this evaluation.[124] However, a federal regulatory agency may, with respect to a matter within its jurisdiction, determine after notice and opportunity for public comment, and publishing of a finding, that one or more of the exceptions are no longer necessary for the protection of consumers and that eliminating such exceptions will not increase the material risk of harm to consumers. It may then apply section 101 to the exceptions identified in its finding.[125]

Section 104. Applicability to Federal and State Governments

[123] S. 761, 106th Cong. §103(c)(1) (2000).
[124] S. 761, 106th Cong. §103(c)(1) (2000).
[125] S. 761, 106th Cong. §103(c)(3) (2000).

Section 104 addresses the applicability of the E-Sign Act to federal and state governments, and specifically to agency rule making.[126]

*Section 104(a): effect on federal and state regulatory agencies' filing and access requirements*: Subject to section 104(c)(2),[127] section 104(a) states that nothing in Title I limits or supercedes any requirement by a federal regulatory agency, self-regulatory organization (SRO), or state regulatory agency that records be filed with such agency or organization in accordance with specified standards or formats.[128] This limited inclusion of SROs is the only reference to SROs in the E-Sign Act.

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[126] "The conference report is designed to prevent Federal and State Regulators from undermining the broad purpose of this Act, to facilitate electronic commerce and electronic record keeping. To ensure that the purposes of this Act are upheld, Federal and State regulatory authority is strictly circumscribed. It is expected that Courts reviewing administrative actions will be rigorous in seeing that the purpose of this Act, to ensure the widest use and dissemination of electronic commerce and records are not undermined." 146 CONG. REC. S5281, 5286 (2000) (Abraham Explanatory Statement). "We have provided both federal and state agencies with the authority to interpret and issue guidance on the proposed law. Providing this interpretive authority will provide businesses with a cost-effective way of getting guidance in how to implement the new law. Without this authority, these questions would have to have been answered by the courts, after extensive and expensive litigation. We have avoided that problem. The conference report gives law enforcement agencies of federal and state governments the authority they need to detect and combat fraud, including the ability to require the retention of written records in paper form if there is a compelling governmental interest in law enforcement. Let me raise one specific example, among many, of where this provision ought to be exercised. The Securities and Exchange Commission should use this provision to require brokers to keep written records of agreements required to be obtained by the SEC's penny stock rules. Investors in the securities markets have been the victims of penny stock abuse for more than a decade. The SEC must exercise every tool at its disposal to fight this kind of fraud." CONG. REC. S5165, 5229 (2000) (statement of Sen. Sarbanes). "Section 104 of the Conference Report specifically permits federal regulatory agencies, such as the SEC, to interpret the law to require retention of written records in paper form if there is a compelling governmental interest in law enforcement for imposing such requirement, and if, imposing such requirement is essential to attaining such interest. For example, we specifically expect the SEC would be able to use this provision to require brokers to keep written records of all disclosures and agreements required to be obtained by the SEC's penny stock rules." 146 CONG. REC. H4341, 4350 (2000) (statement of Rep. Markey).

[127] Section 104(c)(2) allows a federal or state regulatory agency to interpret section 101 of Title I if such agency finds in connection with issuance of such interpretation that the methods selected to carry out the purpose are substantially equivalent to the requirements imposed on records that are not electronic records and will not impose unreasonable costs on the acceptance and use of electronic records. S. 761, 106th Cong. §104(c)(2) (2000).

[128] S. 761, 106th Cong. §104(a) (2000). "…Section 104(a) of the Conference Report protects standards and formats developed by the SEC for electronic filing systems such as EDGAR and the IARD, as well as for systems which are developed by securities industry self-regulatory organization filing systems such as the

*Section 104(b): preservation of federal and state regulatory agencies' existing rulemaking authority*. Section 104(b)[129] preserves federal and state regulatory agencies' existing rule making authority,[130] limits the interpretation authority,[131] sets performance standards,[132] and gives an exception for government acting as a market participant.[133]

First, section 104(b)(1) allows a federal or state regulatory agency, that is responsible for rulemaking under any other statute, to interpret section 101 with respect to such statute through the issuance of regulations pursuant to a statute or, to the extent

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CRD, which the NASD and the states use for registering securities firms and their personnel." 146 CONG. REC. H4341, 4350 (2000) (statement of Rep. Markey). "…[S]ection 104(a) of the conference report expressly preserves governmental filing requirements. Federal agencies are already working toward full acceptance of electronic filings, pursuant to the schedule established by the Government Paperwork Elimination Act. I am confident that State agencies will follow our lead. Until they are technologically equipped to do so, however, they have an unqualified right under section 104(a) to continue to require records to be filed in a tangible printed or paper form." 146 CONG. REC. S5165, 5222 (2000) (statement of Sen. Leahy).

[129] "This provision provides important protection to both affected industry and consumers. It is impossible to envision all of the ways in which this Act will affect existing statutory requirements. This interpretative authority will allow regulatory agencies to provide legal certainty about interpretations to affected parties. Moreover, this authority will allow regulatory agencies to take steps to address abusive electronic practices that might arise that are inconsistent with the goals of their underlying statutes…I would also like to clarify the nature of the responsibility of government agencies in interpreting this bill. As the bill makes clear, each agency will be proceeding under its preexisting rulemaking authority, so that regulations or guidance interpreting section 101 will be entitled to the same deference that the agency's interpretations would usually receive. This is underlined by the bill's requirements that regulations be consistent with section 101, and not add to the requirements of that section, which restate the usual *Chevron* test that applies to and limits an agency's interpretation of a law it administers. Giving each agency authority to apply section 101 to the laws it administers will ensure that this bill will be read flexibly, in accordance with the needs of each separate statute to which it applies. Any reading under which courts would apply an unusual test in reviewing an agency's regulations would generate a great deal of litigation, creating instability and needlessly burdening the courts with technical determinations. Likewise, because these regulations will be issued under preexisting legal authority, and challenges to those regulations will proceed through the methods prescribed under that preexisting authority, whether pursuant to the Administrative Procedure Act or some other statute. Again, this will ensure that any challenges to such regulations are resolved promptly and minimize any resulting instability and burden. Of course, such regulations must satisfy the requirements of the Act." 146 CONG. REC. S5165, 5231 (2000) (Hollings, Wyden and Sarbanes Statement)

[130] S. 761, 106th Cong. §104(b)(1) (2000). "While the conference report preserves such authority to such agencies or organizations, it is intended that use of such authority is rarely exercised." 146 CONG. REC. S5281, 5286 (2000) (Abraham Explanatory Statement).

[131] S. 761, 106th Cong. §104(b)(2) (2000).

[132] S. 761, 106th Cong. §104(b)(3) (2000).

the agency is authorized, by issuing orders or guidance of general applicability that are publicly available and published (in the Federal Register in the case of an order or guidance issued by a federal regulatory agency).[134]

Second, section 104(b)(2) limits the federal and state agencies' ability to interpret section 101. Federal agencies are prohibited from (and state agencies are preempted from) adopting any regulation, order, or guidance unless: (i) it is consistent with section 101 or (ii) it does not add to the requirements of section 101.[135] The agency may also adopt a regulation, order, or guidance if the agency finds that: (i) there is a "substantial justification" for the regulation, order, or guidance; (ii) the methods selected to carry out that purpose (a) are "substantially equivalent" to the requirement imposed on records that are not electronic records and (b) will not impose "unreasonable costs" on the acceptance and use of electronic records; and (iii) meets the technology neutrality provision, which is an essential component of a national baseline, specifically that "the methods selected to carry out that purpose do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signature."[136]

The wording of this provision raises a number of questions. What qualifies as a "substantial justification?" How does one determine that the selected methods for

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[133] S. 761, 106th Cong. §104(b)(4) (2000).
[134] S. 761, 106th Cong. §104(b)(1)(A)-(B) (2000).
[135] S. 761, 106th Cong. §104(b)(2)(A)-(B) (2000).

electronic transactions and records are "substantially equivalent" to requirements for non-electronic transactions and records? Additionally, the regulation cannot impose "unreasonable costs on the acceptance and use of electronic records." What is an unreasonable cost? Acceptance by whom? Does the reasonableness of the cost depend upon whether the cost imposed is ultimately borne by a consumer or a business?[137]

Another important question that arises under the above two subsections is whether they negate prior rulemakings or similar actions by federal or state agencies which facilitate electronic delivery of records, perhaps in ways that are not identical to section 101 of the E-Sign Act. Examples would include SEC Release No. 33-7288; 34-37182; IC-21945; IA-1562 (May 9, 1996) 1996 SEC LEXIS 1299, an interpretive release in which the SEC published its views with respect to the use of electronic media by broker-dealers, transfer agents and investment advisers to deliver information. It is unclear at this point whether the SEC and other agencies which have issued similar rules to allow electronic delivery under certain circumstances and subject to specified criteria now have to revise and reissue those rules to meet the standards of section 104(b) of the E-Sign Act. A related question is whether affected industries can continue to rely on such existing agency rules in the interim.

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[136] S. 761, 106th Cong. §104(b)(2)(C)(i)-(iii) (2000).

[137] In October 2000 the Office of Management and Budget ("OMB") released an undated memorandum to all heads of federal departments and agencies entitled "OMB Guidance on Implementing the Electronic Signature in Global and National Commerce Act" (M-00-15). OMB acknowledged that the memorandum was developed with "substantial help from the Departments of Commerce, Justice and Treasury." The document provides guidance on, among other matters, interpretation of agency powers under section 104 and other sections of the E-Sign Act. Citing solely the floor statements of Democratic members of Congress and of the President when he signed the Act, the guidance contains a number of interesting, and arguably revisionist, statements. For example, it asserts at page 13, that "Agencies may not require use of a particular type of software or hardware in order to comply with Section 101(d). This provision is probably best read to mean that agencies may not require use of the hardware or software of a specific manufacturer, not that they may not set performance standards for hardware or software. The statute permits agencies to require the use of a particular technology or technical specification if the required findings are made."

Section 104(b)(3) defines the performance standards under the E-Sign Act for federal and state regulatory agencies.[138] Under section 104(b)(3)(A) federal or state regulatory agencies may interpret section 101(d) to specify performance standards to ensure accuracy, record integrity, and accessibility of records to be retained, even if in violation of section 104(b)(2)(C)(iii), if the requirement (i) serves an "important governmental objective" and (ii) is "substantially related" the achievement of that objective.[139] However, section 104(b)(3)(A) does not grant any federal or state regulatory agency the authority to require use of a particular type of software or hardware in order to comply with section 101(d).[140]

As above, the use of terms like "important governmental objective" and "substantially related" are sources of uncertainty and possibly of future litigation.

Most importantly, with respect to retention of records in a tangible printed or paper form, a federal or state regulatory agency may interpret section 101(d), in contravention of section 104(b)(2)(C)(iii), to require such retention if (i) there is a

[138] "Section 101(d) recognizes the importance of accuracy and accessibility in electronic records, which is of utmost importance for investor protection and prevention of fraud. Section 104(b)(3) recognizes the need for agencies, such as the SEC, to provide performance standards relating to accuracy, document integrity, and accessibility in their electronic recordkeeping and retention rules. This is intended to preserve requirements such as the SEC's existing electronic recordkeeping rule, Rule 17a-4(f), which specifies that electronic recordkeeping systems must preserve records in a non-rewriteable and non-erasable manner. The Conferees also expect the SEC to work with the securities SROs to the extent necessary to ensure that accuracy, accessibility, and integrity standards also cover SRO recordkeeping requirements in an electronic environment." 146 CONG. REC. H4341, 4350 (2000) (statement of Rep. Markey).

[139] S. 761, 106th Cong. §104(b)(3)(A) (2000). Therefore, 104(b)(3) extends the federal and state regulatory interpretive authority to override the technology neutrality provision, 104(b)(2)(C)(iii), but only if doing so (1) serves and important governmental objective; and (2) is substantially related to the achievement of that objective. 146 CONG. REC. S5281, 5286 (2000) (Abraham Explanatory Statement).

"compelling government interest" relating to law enforcement or national security for imposing such requirement and (ii) imposing such a requirement is "essential" to attaining such interest.[141] Thus, there is an "escape valve" that allows a federal or state agency to require paper records, not just for filings with it but for transactions by the industry it regulates. However, terms like "compelling governmental interest" and "essential" may invite litigation.

If the government is acting as a market participant, then section 104(b)(2)(C)(iii) does not apply to the statutes, regulations, or other rules of law governing procurement by the federal or any state government or any of their agencies or instrumentalities.[142]

*Section 104(c): additional limitations on federal and state regulatory agencies*. Additionally, section 104(c) makes clear that nothing in section 104(b), except for section 104(b)(3), is to be construed to grant any federal or state regulatory agency authority to impose or reimpose any requirement that a record be in a tangible printed or paper

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[140] S. 761, 106th Cong. §104(b)(3)(A) (2000).

[141] S. 761, 106th Cong. §104(b)(3)(B) (2000). "It is important to note that the test in subsection (b)(3)(B) is higher and more stringent than in subsection (b)(3)(A). This is intentional as it is an effort to impose an extremely high barrier before a Federal or State regulatory agency will revert back to requiring paper records. However, this does not diminish the test contained subsection (b)(3)(A). It, too, is intended to be an extremely high barrier for a Federal or State regulatory agency to meet before the technology neutrality provision is violated. It is intended that use of either of these tests will be necessary in only a very, very few instances. It is expected that Federal and State agencies take all action and exhaust all other avenues before exercising authority granted in paragraph (3)." 146 CONG. REC. S5281, 5286 (2000) (Abraham Explanatory Statement).

[142] S. 761, 106th Cong. §104(b)(4) (2000).

form.[143] Further, nothing in sections 104(a) or 104(b) relieves any federal regulatory agency of its obligations under the Government Paperwork Elimination Act.[144]

*Section 104(d): authority granted to federal and state regulatory agencies to exempt certain categories of records from section 101(c) consent requirement*. Finally, section 104(d) addresses the authority of federal and state agencies to exempt from the consent provisions. First, 104(d)(1) enables a federal regulatory agency, "with respect to a matter within its jurisdiction, by regulation or order issued after a notice and an opportunity for public comment, to exempt without condition a specified category or type of record from the section 101(c) requirements if the exemption is necessary to eliminate a "substantial burden on electronic commerce" and will not increase the "material risk" of harm to consumers."[145]

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[143] S. 761, 106th Cong. §104(c)(1) (2000).

[144] S. 761, 106th Cong. §104(c)(2) (2000). The Government Paperwork Elimination Act was promulgated to minimize the burden of Federal paperwork demands upon small businesses, educational and nonprofit institutions, Federal contractors, State and local governments, and other persons through the sponsorship and use of alternative information technologies. 44 U.S.C. 3501, 3504(h).

[145] S. 761, 106th Cong. §104(d)(1) (2000). "Finally, the Conference Report's consent provisions are similar to much of the SEC's guidance in the electronic delivery area. Section 104(d)(1) permits agencies such as the SEC to continue to provide flexibility in interpreting consent provisions anticipated by the Conference Report. In addition, a specific provision contained in section 104(d)(2) anticipates that the SEC will act to clarify that documents, such as sales literature, that appear on the same website as, or which are hyperlinked to, the final prospectus required to be delivered under the federal securities laws, can continue to be accessed on a website as they are today under SEC guidance for electronic delivery." 146 CONG. REC. H4341, 4350 (2000) (statement of Rep. Markey). As usual, Senator Leahy took a critical view. "Section 104(d)(1) is another political compromise that blemishes this conference report, although I believe its actual impact will be negligible. It provides that Federal agencies may exempt a specified category or type of record from the consumer consent requirements of section 101(c), but only if such exemption is 'necessary' to eliminate a 'substantial' burden on electronic commerce, and it will not increase the material risk of harm to consumers. While Chairman Bliley indicated in his floor statement yesterday that this test should not be read as too limiting, the opposite is true. The test is, and was intended to be, demanding. The exemption must be 'necessary,' and not merely 'appropriate,' as Chairman Bliley suggested. It should also be noted that the conferees considered and specifically rejected language that would have authorized State agencies to exempt records from the consent requirements." 146 CONG. REC. S5165, 5222 (2000) (statement of Sen. Leahy). "It is intended that the test under subsection (d)(1) not be read too limiting. There are vast numbers of instances when section 101(c) may not be appropriate or necessary and should

Further, section 104(d)(2) directs the SEC to issue a regulation or order pursuant to 104(d)(1) within 30 days after the date of enactment of the E-Sign Act, exempting from section 101(c) any records that are required to be provided in order to allow advertising, sales literature, or other information concerning a security issued by an investment company that is registered under the Investment Company Act of 1940, or concerning the issuer thereof, to be excluded from the definition of a prospectus under section 2(a)(10)(A) of the Securities Act of 1933.[146] This provision was inserted late in the process at the conference in order to meet concerns that the Act not interfere with the electronic delivery (without consumer consent) of prospectuses which must accompany or precede the provision of sales literature.

The SEC fulfilled the requirement of Section 104(d)(2) on July 27, 2000, with the issuance of interim final Rule 160 under the Securities Act of 1933.[147] Consistent with the SEC's interpretations of existing law, the rule permits a registered investment company to provide its prospectus and supplemental sales literature on its web site or by other electronic means without first obtaining investor consent to the electronic format of the prospectus. The SEC also clarified its interpretation on the responsibility of registered investment companies for hyperlinks to third-party web sites from their advertisements or sales literature. Rule 160 is effective October 1, 2000, which also the general effective date for Title I of the E-Sign Act (see *infra*, however).

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be exempted by the appropriate regulator." 146 CONG. REC. S5281, 5286 (2000) (Abraham Explanatory Statement) and 146 CONG. REC. H4341, 4355 (Bliley Explanatory Statement).

[146] S. 761, 106th Cong. §104(d)(2) (2000).

*Section 104(e): Federal Communications Commission ("FCC") electronic letters of agency*. Section 104(e) directs the FCC to "not hold any contract for telecommunications service or letter of agency preferred carrier change, that otherwise complies with the Commission's rules, to be legally ineffective, invalid, or unenforceable solely because an electronic record or electronic signature was used in its formation or authorization."[148]

Section 104(e) applies the general rule of validity of electronic records and electronic signatures to specific papers filed with the FCC, directing that it shall not find a contract or record that otherwise meets its requirements legally to be ineffective or unenforceable solely because an electronic record or electronic signature was used in its formation or authorization. Senator Abraham stated that this section was included because the FCC "has been very slow, even reticent, to clearly authorize the use of an Internet letter of agency for a consumer to conduct a preferred carrier change." As a result of the FCC's failure to act on this matter, the E-Sign Act provides specific direction to the FCC to recognize Internet letters of agency for a preferred carrier change.[149]

Section 105. Studies

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[147] Release No. 33-7877, IC-24582 (July 27, 2000), 65 *Fed. Reg.* 47281 (August 2, 2000).
[148] S. 761, 106th Cong. §104(e) (2000).
[149] S. 761, 106th Cong. §104(e) (2000). 146 CONG. REC. S5281, 5287 (2000) (Abraham Explanatory Statement).

*Section 105(a): delivery of studies*. Within 12 months of enactment of the E-Sign Act the Secretary of Commerce must conduct a study and report to Congress regarding the effectiveness of the delivery of electronic records to consumers using electronic mail as compared to delivery of records via the U.S. Postal Service and private express mail services.[150]

*Section 105(b): study of electronic consent*. Additionally, within 12 months after the date of the enactment of the E-Sign Act, the Secretary of Commerce and the Federal Trade Commission ("Commission") must submit a report to the Congress evaluating (i) any benefits provided to consumers by the "reasonable demonstration" procedure required for consumer consent to receive electronic records in section 101(c)(1)(C)(ii); (ii) any burdens imposed on electronic commerce by section 101(c)(1)(C)(ii); (iii) whether the benefits of section 101(c)(1)(C)(ii) outweigh the burdens; (iv) whether the absence of the procedure required by section 101(c)(1)(C)(ii) would increase the incidence of fraud directed against consumers; and (v) suggesting any appropriate revisions to section 101(c)(1)(C)(ii).[151] This subsection was added as a concession to industry and Chairman Gramm, both of whom were concerned about the electronic consent provisions.

Section 106. Definitions

[150] S. 761, 106th Cong. §105(a) (2000).
[151] S. 761, 106th Cong. §105(b) (2000).

The defined terms in the E-Sign Act are in large part based on the UETA defined terms.[152] Thirteen terms are defined in the E-Sign Act. Four terms involve the base term "electronic." First, the term "electronic" is broadly defined and means "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities."[153] Second, the term "electronic agent" means "a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part without review or action by an individual at the time of the action or response."[154] Third, "electronic record" means "a contract or other record created, generated, sent, communicated, received, or stored by electronic means."[155] Finally, "electronic signature" is defined as "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record."[156]

Five of the defined terms relate to parties who will interact under the E-Sign Act. "Consumer" is defined as "an individual who obtains, through a transaction, products or

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[152] Four out of the 13 terms are substantially identical to their analogues in UETA. *See* UETA at note, Section 2. There are, however, eight defined terms in UETA that do not appear in the E-Sign Act: "agreement," "automated transaction," "computer program," "contract," "governmental agency," "information processing system," and "security procedure." *Id.* There are three defined terms in the E-Sign Act that are not in UETA: "consumer," "requirement," and "self-regulatory organization."

[153] S. 761, 106th Cong. §106(2) (2000). This definition is identical to the UETA definition for the same term. *See* UETA, section 2(5).

[154] S. 761, 106th Cong. §106(3) (2000). This definition is also identical to the UETA definition for the same term, except for the additional phrase "at the time of the action or response." *See* UETA, section 2(6).

[155] S. 761, 106th Cong. §106(4) (2000). This definition is identical to the UETA definition for the same term, except for the phrase "a contract or other record." As above, UETA specified only "a record." *See* UETA, section 2(7).

[156] S. 761, 106th Cong. §106(5) (2000). This definition is identical to the UETA definition for the same term, except for the phrase "a contract or other record." UETA only specified "a record." *See* UETA, section 2(8).

services which are used primarily for personal, family, or household purposes, and also means the legal representative of such an individual."[157] The term "person" means "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity."[158] The term "federal regulatory agency" in Title I, is defined as an agency, as defined in section 552(f) of Title 5, United States Code: "…the term 'agency'…includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."[159] Under the E-Sign Act a self-regulatory organization means "an organization or entity that is not a Federal regulatory agency or a State, but that is under the supervision of a Federal regulatory agency and is authorized under Federal law to adopt and administer rules applicable to its members that are enforced by such organization or entity, by a Federal regulatory agency, or by another self-regulatory organization."[160] Finally, a "State" is defined as including "the District of Columbia and the territories and possessions of the United States."[161]

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[157] S. 761, 106th Cong. §106(1) (2000). This term is not defined in UETA. *See* UETA, Section 2.
[158] S. 761, 106th Cong. §106(8) (2000). This definition is the same as the UETA definition. *See* UETA, section 2(12).
[159] S. 761, 106th Cong. §106(6) (2000) and 5 U.S.C. 552(f) (1996). UETA offers a similarly inclusive definition of "governmental agency" which "means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the federal government or of a State or of a county, municipality, or other political subdivision of a State." See UETA, section 2(9).
[160] S. 761, 106th Cong. §106(11) (2000). This term is not defined in UETA. *See* UETA, Section 2.
[161] S. 761, 106th Cong. §106(12) (2000). This term was defined at once more broadly and more concisely in UETA: "'State' means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, which is recognized by federal law or formally acknowledged by a State." UETA, section 2(15).

The final four remaining terms of the E-Sign Act, are "information," "records," "requirements" and "transactions." "Information" is defined as "data, text, images, sounds, codes, computer programs, software, databases, or the like."[162] The important term "record" is broadly defined to mean "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."[163] It thus covers a wide variety of notices and other communications. However, it is notable that "electronic record" is defined to include "a contract or other record," whereas the definition of a "record" does not expressly include a contract, although it may implicitly include the term. The term "requirement" is defined to include a prohibition.[164] Finally, "transaction" means "an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons, including any of the following types of conduct[:] (A) the sale, lease, exchange, licensing, or other disposition of (i) personal property, including goods and intangibles, (ii) services, and (iii) any combination thereof; and (B) the sale, lease, exchange, or other disposition of any interest in real property, or any combination thereof."[165] The financial services industry argued unsuccessfully for a more expansive definition that expressly included a number of investment products by name. However, the existing definition should reasonably be construed to include most, if not, all financial services.

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[162] S. 761, 106th Cong. §106(7) (2000). This definition is identical the UETA definition for the same term. *See* UETA, section 2(10).
[163] S. 761, 106th Cong. §106(9) (2000). This definition is also identical to the UETA definition. *See* UETA, section 2(13).
[164] S. 761, 106th Cong. §106(10) (2000). This term was not defined in UETA. *See* UETA, Section 2.
[165] S. 761, 106th Cong. §106(13) (2000). This term was defined differently in UETA: "'Transaction' means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs." UETA, section 2(16).

Section 107. Effective Date

*Section 107(a): general effective date*. In general, Title I of the E-Sign Act is effective on October 1, 2000.[166]

*Section 107(b): exceptions to general effective date*. However, with respect to any records required to be retained under federal or state statute, regulation or other rule of law, the effective date for Title I of the Act is March 1, 2001.[167] The scope of this delayed effective date covers many records, including basic transactional records, which are required to be maintained by regulated industries such as banks and broker-dealers. Thus, under the wording of section 107(b)(1), "this title" (meaning Title I of the Act, with all of its substantive provisions in section 101) will not be effective as to any record covered by section 107(b)(1). Therefore the substantive benefits of the E-Sign Act probably will largely not be available to regulated industries until March 1, 2001.

Moreover, this March 1, 2001 effective date as to retained records will be further delayed until June 1, 2001 if on March 1, 2001 a federal or state regulatory agency has announced, proposed or initiated, but not completed, a rulemaking proceeding to prescribe a regulation under section 104(b)(3)(A).[168]

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[166] S. 761, 106th Cong. §107(a) (2000).
[167] S. 761, 106th Cong. §107(b)(1)(A) (2000).
[168] S. 761, 106th Cong. §107(b)(1)(B) (2000). Section 104(b)(3)(A) allows federal and state regulatory agencies to violate the technology neutrality provision, section 104(b)(2)(C)(iii), when interpreting 101(d) to specify performance standards to assure accuracy, record integrity, and accessibility of records that are required to be retained. S. 761, 106th Cong. §104(b)(3)(A) (2000).

Two additional delayed effective dates are incorporated in the E-Sign Act for certain government-guaranteed or insured loans and for student loans. First, as to any transaction involving a loan guarantee or loan guarantee commitment made by the United States government or involving a program listed in the Federal Credit Supplement of the FY2001, Budget of the United States, Title I applies on or after June 30, 2001.[169] Second, as to records provided to a consumer under a student loan application or student loan pursuant to the Higher Education Act of 1965, section 101(c) of the E-Sign Act does not apply until the earlier of June 30, 2001 or "such time as the Secretary of Education publishes revised promissory notes under section 432(m) of the Higher Education Act of 1965."[170]

### 2. Title II—Transferable Records

*Section 201(a): definitions for section 201(a).* Section 201 sets forth the criteria for electronic negotiable instruments, referred to as "transferable records," inserted to facilitate increased use of electronic media in the secondary mortgage market.[171] It is based on section 16 of UETA.

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[169] S. 761, 106th Cong. §107(b)(2) (2000). "The one year delay was granted to permit the federal government time to institute safeguards necessary to protect taxpayers from risk of default on loans guaranteed by the federal government." 146 CONG. REC. S5281, 5287 (2000) (Abraham Explanatory Statement).

[170] S. 761, 106th Cong. §107(b)(3) (2000).

[171] "The conference report adopts a new provision in recognition of the need to establish a uniform national standard for the creation, recognition, and enforcement of electronic negotiable instruments. The development of a fully-electronic system of negotiable instruments such as promissory notes is one that will produce significant reductions in transaction costs. This provision, which is based in part on Section 16 of the Uniform Electronic Transactions Act, sets forth a criteria-based approach to the recognition of electronic negotiable instruments, referred to as `transferable records' in this section and in UETA. It is intended that this approach create a legal framework within which companies can develop new technologies that fulfill all of the essential requirements of negotiability in an electronic environment, and

Section 201 provides legal support for the creation, transferability and enforceability of electronic notes as against the issuer or obligor. The certainty created by section 201 is intended to provide the requisite incentive for industry to develop the systems and processes, which involve significant expenditures of time and resources, to enable the use of such electronic documents. Section 201 provides for the creation of an electronic record which may be controlled by the holder, who in turn may obtain the benefits of holder in due course and good faith purchaser status.

A transferable record is defined as "an electronic record that[:] (i) would be a note under Article 3 of the [UCC] if the electronic record were in writing; (ii) the issuer of the electronic record expressly has agreed is a transferable record; and (iii) relates to a loan secured by real property."[172] Under Title II, a transferable record may be executed using an electronic signature.[173]

*Sections 201(b-g): treatment of transferable records*. Under Section 201 acquisition of "control" over an electronic record serves as a substitute for "possession" of the paper instrument. "Control" under Section 201 serves as a substitute for delivery,

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in a manner that protects the interests of consumers." 146 CONG. REC. S5281, 5283 (2000). "The conference report notes that the official Comments to section 16 of UETA, as adopted by the National Conference of Commissioners on Uniform State Laws, provide a valuable explanation of the origins and purposes of this section, as well as the meaning of particular provisions." *Id.*

[172] S. 761, 106th Cong. §201(a)(1) (2000). "The conference report further notes that the reference in section 201(a)(1)(C) to loans secured by real property' includes all forms of real property, including single-family and multi-family housing." 146 CONG. REC. S5281, 5287-5288 (2000) (Abraham Explanatory Statement).

[173] *Id.* "The conference report notes that, pursuant to sections 3(c) and 7(d) of the UETA, an electronic signature satisfies any signature requirement under Section 16 of the UETA. It is intended that an electronic

endorsement and possession of a negotiable promissory note. Section 201(b) allows control to be found so long as "a system employed for evidencing the transfer of interests in the transferable record reliably establishes [the person claiming control] as the person to which the transferable record was issued or transferred." The key point is that a system, whether involving a third party registry or technological safeguards, must be shown to reliably establish the identity of *the* person entitled to payment.

Section 201(c) then sets forth a list of requirements for such a system. Generally, the transferable record must be unique, identifiable, and except as specifically permitted, unalterable. That "authoritative copy" must (i) identify the person claiming control as the person to whom the record was issued or most recently transferred, (ii) be maintained by the person claiming control or its designee, and (iii) be unalterable except with the permission of the person claiming control. In addition any copy of the authoritative copy must be readily identifiable as a copy and all revisions must be readily identifiable as authorized or unauthorized.

If a person establishes control, section 201(d) provides that that person is the "holder" of the transferable record, which is equivalent to a holder of an analogous paper negotiable instrument. If the person acquired control in a manner which would make it a holder in due course ("HIDC") of an equivalent paper record, the person acquires the rights of a HIDC. The person in control would therefore be able to enforce the transferable record against the obligor regardless of intervening claims and defenses.

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signature shall satisfy any signature requirement under this provision, as well." 146 CONG. REC. S5281,

Section 201(e) accords to the obligor of the transferable record rights equal to those of an obligor under an equivalent paper record. Accordingly, unless a waiver of defense clause is obtained in the electronic record, or the transferee obtains HIDC rights under section 201(d), the obligor has all the rights and defenses available to it under a contract assignment. Additionally, the obligor has the right to have the payment noted or otherwise included as part of the electronic record. Finally, section 201(f) grants the obligor the right to have the transferable record and other information made available for purposes of assuring the correct person to pay, thereby allowing the obligor to protect its interest and obtain the defense of discharge by payment or performance.

*Section 202: effective date of Title II*. Title II is effective 90 days after enactment of the E-Sign Act.

### 3. Title III—Promotion of International Electronic Commerce

*Section 301: principles governing the use of electronic signatures in international transactions*. Title III directs the Secretary of Commerce to promote electronic commerce on an international level.[174] It requires the Secretary to promote the

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5287 (2000) (Abraham Explanatory Statement).

[174] "Title III directs the Secretary of Commerce to take an active role in bilateral and multilateral talks to promote the use and acceptance of electronic signatures and electronic records worldwide. It is intended that the Secretary promote the principles contained in this Act internationally. However, it is possible that some foreign nations may choose to adopt their own approach to the use and acceptance of electronic signatures and electronic records. In such cases, the Secretary should encourage those nations to provide legal recognition to contracts and transactions that may fall outside of the scope of the national law and encourage those nations to recognize the rights of parties to establish their own terms and conditions for the

acceptance and use, on an international basis, of electronic signatures in a manner consistent with section 101 of Title I and to eliminate or reduce the impediments to commerce in electronic signatures, for the purpose of facilitating the development of interstate and foreign commerce.[175] Title III directs the Secretary to follow four principles in international negotiations: (i) remove paper-based obstacles to electronic transactions by adopting relevant principles from the Model Law on Electronic Commerce adopted in 1996 by the United Nations Commission on International Trade Law; (ii) permit parties to a transaction to determine the appropriate authentication technologies and implementation models for their transactions, with assurance that those technologies and implementation models will be recognized and enforced;[176] (iii) permit parties to a transaction to have the opportunity to prove in court or other proceedings that their authentication approaches and their transactions are valid; and (iv) take a nondiscriminatory approach to electronic signatures and authentication methods from other jurisdictions.[177]

### 4. Title IV—Commission on Online Child Protection

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use and acceptance of electronic signatures and electronic records." 146 CONG. REC. S5281, 5288 (2000) (Abraham Explanatory Statement).

[175] S. 761, 106th Cong. §301(a)(1) (2000).

[176] "There is particular concern about international developments that seek to favor specific technologies of processes for generating electronic signatures and electronic records. Failure to recognize multiple technologies may create potential barriers to trade and stunt the development of new and innovative technologies." 146 CONG. REC. S5281, 5288 (2000) (Abraham Explanatory Statement). The Abraham Explanatory Statement singles out two foreign approaches, the German Digital Signature Law of July 1997 and the Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community Framework for electronic signatures. *Id.* "Parties to a commercial transaction should be able to chose the appropriate authentication technologies and implementation models for their transactions. Unnecessary regulation of commercial transactions distorts the development and efficient operation of markets, including electronic markets. Moreover, the rapid development of the electronic marketplace is resulting in new business models and technological innovations. This is an evolving process. Therefore, government attempts to regulate may impede the development of newer alternative technologies." *Id.*

*Section 401: authority to accept gifts*. Title IV amends the Child Online Protection Act to include a new subsection.[178] This subsection allows the Commission on Online Child Protection to accept, use and dispose of gifts, bequests or devises of services or property, both real and personal for the purpose of aiding or facilitating the work of the Commission.[179]

[177] S. 761, 106th Cong. §301(a)(2) (2000).
[178] S. 761, 106th Cong. §401 (2000).
[179] *Id.*